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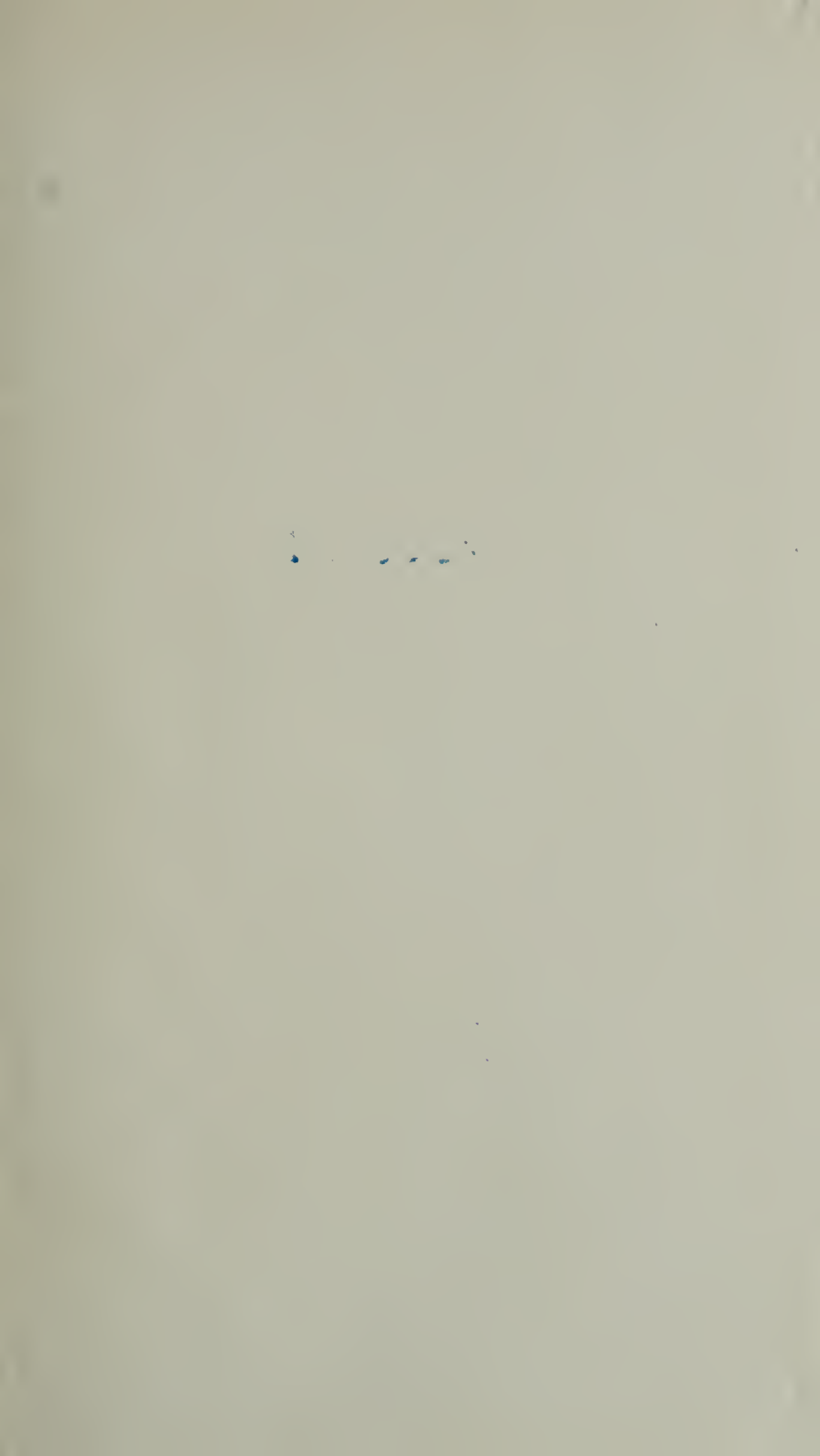
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2. 2465-
No. 11557

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM GATHER KELLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

SEP 19 1917

PAUL P. O'BRIEN,
CLERK

No. 11557

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

GLADYS TOWLES ROOT

631 A. G. Bartlett Building

215 West Seventh Street

Los Angeles 14, Calif.

For Appellee:

JAMES M. CARTER

United States Attorney

ERNEST A. TOLIN

PAUL FITTING

Assistants U. S. Attorney

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif. [1*]

In the District Court of the United States in and for the
Southern District of California

Central Division

September, 1946, Term

No. 19112

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM GATHER KELLEY,

Defendant.

INDICTMENT

[U. S. C., Title 18, Sec. 318

Secretion of and Opening Mail by Post Office Employee]

The grand jury charges:

COUNT ONE

[U. S. C., Title 18, Sec. 318]

On or about December 21, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant William Gather Kelley, being a person employed in the United States Postal Service as a custodial laborer in the Los Angeles, California, Post Office, did secrete and embezzle a package which came into his possession as said custodial laborer, and which was intended to be conveyed by mail, addressed to Mrs. E. Johnson, 1706 South Hoover, Los Angeles, California. [2]

COUNT TWO

[U. S. C., Title 18, Sec. 318]

On or about December 21, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant William Gather Kelley, being a person employed in the United States Postal Service as a custodial laborer in the Los Angeles, California, Post Office, did unlawfully detain, delay, and open a package which came into his possession as said custodial laborer, and which was intended to be conveyed by mail, addressed to Mrs. A. S. Cluff, 2026 South Burnside, Los Angeles, California.

A True Bill.

R. W. BLANCHARD

Foreman

JAMES M. CARTER

United States Attorney [3]

[Minutes: Monday, January 13, 1947]

Present: The Honorable Wm. C. Mathes, District Judge.

This cause coming on for arraignment and plea of defendant William Gather Kelley; R. H. Kinnison, Assistant U. S. Attorney, appearing as counsel for the Government; Vince M. Townsend, Jr., Esq., appearing as counsel for the said defendant, who is present on bond:

The defendant states his true name is as set forth in the Indictment, and his attorney having waived reading thereof, the defendant pleads not guilty to both counts. It is ordered that the cause is hereby set for trial on January 31, 1947, at 10 A. M. [4]

[Title of District Court and Cause]

WAIVER OF JURY

The above-entitled cause coming on regularly for trial, defendant being present with counsel, Vince M. Townsend, Jr., Esq., and the defendant being desirous of having the case tried before the Court without a jury, now requests of the Court that the case be so tried and hereby consents that the Court shall sit without a jury and hear and determine the charges against the defendant without a jury. The defendant also waives any special finding of facts by the Court.

Dated: January 13th, 1947.

WILLIAM G. KELLEY

Defendant in pro per.

I have advised the defendant fully as to his (her) rights and assure the Court that his (her) request for a trial without a jury and waiver of special findings is understandingly made.

Dated: January 13th, 1947.

VINCE MONROE TOWNSEND, JR.

Attorney for Defendant

The United States Attorney hereby waives any special finding of facts and consents that the request of the defendant be granted and that the trial proceed without a jury.

Dated: January 13th, 1947.

JAMES M. CARTER

U. S. Attorney

By Paul Fitting

Assistant U. S. Attorney

Approved:

WM. C. MATHES

United States District Judge

[Endorsed]: Filed Jan. 13, 1947. [5]

[Minutes: Friday, January 31, 1947]

Present: The Honorable Wm. C. Mathes, District Judge.

This cause coming on for trial of the defendant William Gather Kelley; Paul Fitting, Esq., Asst. U. S. Attorney, appearing for the Government; Vince M. Townsend, Jr., Esq., appearing for the defendant; the defendant being present on bond:

Charles Franzen is called, sworn, and testifies for the Government. U. S. Exhibits 1, 2, 3 and 4 are marked for identification.

At 11:10 A. M. court recesses and reconvenes at 11:20 A. M.; all present as before; the defendant is present.

Witness Franzen testifies further.

Alfred E. French is called, sworn, and testifies for the Government. U. S. Exhibits 5 and 6 are marked for identification.

At 12 o'clock noon court recesses to 1:30 P. M. Court reconvenes at 1:54 P. M.; all present as before. The defendant is present.

Witness French resumes the stand and testifies further.

Ray Kinney is called and sworn, and counsel stipulate as to certain testimony. U. S. Exhibits 1, 2, 3 and 4, heretofore marked for identification, are offered and admitted in evidence.

The Government rests. The defendant moves for judgment of acquittal and the motion is denied.

William G. Kelley is called, sworn, and testifies in his own behalf. The defendant rests.

George J. Turner is called, sworn, and testifies for the [6] Government. Witness French is recalled and testifies further.

Both sides rest. Attorney Townsend argues for the defendant.

At 4:40 P. M. the Court makes a statement and finds the defendant guilty on count 1 and guilty on count 2. It is ordered that this cause be, and it hereby is, referred to the Probation Officer for investigation and report and continued to February 10, 1947, at 1:30 P. M. for hearing and sentence. The defendant is remanded into custody of the U. S. Marshal and his bond exonerated. [7]

[Minutes: Monday, February 10, 1947]

Present: The Honorable Wm. C. Mathes, District Judge.

This cause coming on for hearing on report of the Probation Officer and sentence of the defendant William Gather Kelley on counts 1 and 2; Paul Fitting, Esq., Asst. U. S. Attorney, appearing for the Government; Vince M. Townsend, Jr., Esq., appearing for the defendant; the defendant being present:

Attorney Townsend makes a statement for the defendant.

The Court pronounces judgment against the defendant as follows:

* * * * * [8]

District Court of the United States
Southern District of California
Central Division

No. 19112

Criminal Indictment in Two Counts for Violation of
U. S. C., Title 18, Sec. 318

UNITED STATES

v.

WILLIAM GATHER KELLEY

JUDGMENT AND COMMITMENT AND
PROBATIONARY ORDER

On this 10th day of February, 1947, came the United States Attorney, and the defendant William Gather Kelley appearing in proper person, and with his attorney, Vince M. Townsend, Jr., Esquire, and

The defendant having been convicted on a trial by the court without a jury, jury trial having been waived by the defendant, of the offenses charged in the first and second counts of the indictment in the above-entitled cause, to wit: that on or about December 21, 1946, in Los Angeles County, California, while employed as a custodial laborer in the Los Angeles, California, Post Office, did secrete and embezzle two packages which came into his possession as said custodial laborer and which were intended to be conveyed by mail, addressed respectively to Mrs. E. Johnson, and Mrs. A. S. Cluff; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the

custody of the Attorney General or his authorized representative for imprisonment for the period of two years in an institution to be selected by the Attorney General of the United States or his authorized representative, for the offense charged in the First Count of the indictment; and

It Is Further Ordered that sentence for the offense charged in the second count of the indictment be and is hereby suspended and the defendant is placed on probation for the period of two years following execution of the sentence imposed for the offense charged in the First Count of the indictment; and the conditions of probation are hereby fixed as follows: (1) During the term of his probation the defendant shall pay to the United States of America a fine of \$500 in installments at such times and in such amounts as the Probation Officer of this Court shall direct; and (2) Throughout the term of his probation the defendant shall comply with all rules which the Probation Officer of this Court shall prescribe for the guidance of his personal conduct.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) WM. C. MATHES

United States District Judge

Filed

A True Copy. Certified this 10th day of February, 1947.

(Signed) EDMUND L. SMITH

Clerk

(By) Louis J. Somers

Deputy Clerk [9]

[Title of District Court and Cause]

NOTICE OF MOTION FOR NEW TRIAL

To the United States of America and to Paul Fitting,
United States Attorney:

You and Each of You Will Please Take Notice and Notice Is Hereby Given that the defendant, William Gather Kelley by and through his Counsel, Vince Monroe Townsend, Jr., on Monday, February 17, 1947, in the above entitled court and in Court No. 2 thereof, the Honorable Judge Mathes presiding, which court room is located on the Second Floor Federal Building, Temple and Spring Streets in Los Angeles at the hour of 10:00 o'clock A. M., or as soon thereafter as Counsel may be heard, will move the Court for a new trial of the above entitled action.

Said motion will be made upon the grounds as set forth in the motion attached hereto, incorporated herein by reference and made a part hereof. [10]

Said motion will be made and based upon this Notice of Motion and upon all pleadings and papers on file herein, dated this eleventh day of February, 1947.

Attorney for Defendant [11]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 12, 1947. [12]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Comes now the defendant, William Gather Kelley, and moves the Court to grant him a new trial for the following reasons:

I.

The Court erred in denying the defendant's motion for acquittal made at the conclusion of the evidence.

II.

The verdict and findings of guilt by the Court is contrary to the weight of evidence.

III.

The verdict and finding of the Court is not supported by substantial evidence.

IV.

The Court erred in admitting testimony of the Government's witness, Turner, overruling the defendant's objections.

Dated this eleventh (11) day of February, 1947. [13]

Attorney for Defendant [14]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Feb. 12, 1947. [15]

[Minutes: Monday, February 17, 1947]

Present: The Honorable Wm. C. Mathes, District Judge.

This cause coming on for hearing motion for a new trial; Paul Fitting, Assistant U. S. Attorney, appearing as counsel for the Government; Vince M. Townsend, Esq., appearing as counsel for the said defendant, who is present:

Attorney Townsend moves for a new trial and argues in support of the said motion. The motion for a new trial is denied and it is ordered that the defendant be remanded to custody. Counsel gives oral notice of appeal.

Attorney Townsend presents notice of appeal, motion to fix bail pending appeal, and motion to proceed in forma pauperis, and makes a statement in furtherance of motion to fix bail. Motion to admit the defendant to bail pending appeal is denied. It is ordered that the cause is hereby continued to Feb. 19, 1947, at 1:30 P. M., for hearing on proceeding in forma pauperis, and the U. S. Marshal is instructed to produce the defendant in court at that time. At the request of the defendant it is ordered that application to proceed in forma pauperis is hereby withdrawn and that the cause as to the said matter be stricken from the calendar. [16]

[Title of District Court and Cause]

NOTICE OF APPEAL

William Gather Kelley, 1353 West 36th Place, Los Angeles 7, California: Appellant:

Vince Monroe Townsend, Jr., 4406½ South Central Avenue, Los Angeles 11, California, Telephone ADams 1-5910, Attorney for Appellant.

OFFENSE

The defendant is charged by indictment with two counts of violating Title 18, Section 318 of the United States Code, Count One alleging that the defendant, on or about the 21st of December, 1946, being a person employed in the United States Postal Service, did secrete and embezzle a package, which was intended to be conveyed by mail, addressed to Mrs. E. Johnson, 1706 South Hoover Avenue, Los Angeles, California; Count Two alleging that on or about the same said date defendant, being employed in the United States Postal Service, did unlawfully detain, delay and open a package, which was intended to be conveyed by mail, addressed to Mrs. A. S. Cluff, 2026 [17] South Burnside, Los Angeles, California.

On Monday, February 10, 1947, the Court, with the Honorable William C. Mathes, Judge presiding, having theretofore found the defendant guilty on both counts, did pronounce judgment and did sentence the defendant to two years in the Federal Penitentiary, place to be chosen by the Attorney General of the United States on the first count, and probation for the succeeding two years on the second count, together with a fine in the sum of \$500.00.

The defendant is now being held in the Los Angeles County Jail under federal custody, and is not on bail.

I, William Gather Kelley, the Above Named Appellant, Do Hereby Appeal the Above Entitled Cause to the United States Circuit Court of Appeals for the 9th Circuit From the Above Stated Judgment.

Dated this 17th day of February, 1947.

VINCE MONROE TOWNSEND, JR.
Attorney for Appellant

GROUND FOR APPEAL

The ground upon which the defendant appeals is as follows:

I.

That the Court erred in denying the defendant's motion for a new trial.

II.

That the Court erred in denying the defendant's motion for acquittal made at the conclusion of the evidence.

III.

That the finding of guilt by the Court on both counts and the resulting judgment and sentence thereupon is contrary to the weight of evidence.

IV.

That the finding of guilt of the Court and the resulting [18] judgment and sentence pronounced thereupon is not supported by substantial evidence.

V.

That the Court erred in admitting the testimony of the Government's witness, Turner, overruling the defendant's objection.

Dated this 17th day of February, 1947.

VINCE MONROE TOWNSEND, JR.

Attorney for Appellant

[Endorsed]: Filed Feb. 18, 1947. [19]

[Title of District Court and Cause]

ELECTION FOR STAY OF EXECUTION

To the Honorable William Mathes, Judge of the District Court of the United States, and to Robert E. Clark, United States Marshal:

You and Each of You Will Please Take Notice and Notice Is Hereby Given that the above named defendant, William Gather Kelley, does hereby declare his election that the execution of his sentence in the above entitled cause heretofore pronounced by the above entitled court be stayed pending the disposition of this cause upon appeal, or until a further election is filed by and in behalf of the said defendant.

Dated this 10th day of March, 1947.

VINCENT MONROE TOWNSEND, JR.

Attorney for Defendant [20]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Mar. 11, 1947. [21]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 24 inclusive contain full, true and correct copies of Indictment; Minute Order Entered January 13, 1947; Waiver of Jury; Minute Orders Entered January 31, 1947 and February 10, 1947; Judgement and Commitment and Probationary Order; Notice of Motion for New Trial; Motion for New Trial; Minute Order Entered February 17, 1947; Notice of Appeal; Election for Stay of Execution and Designation of Record on Appeal which, together with copy of reporter's transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.35 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 21 day of June, A. D. 1947.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable William C. Mathes, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Friday, January 31, 1947

Appearances:

For the Plaintiff: James M. Carter, Esq., United States Attorney; Paul Fitting, Esq., Asst. United States Attorney.

For the Defendant: Vince M. Townsend, Jr. Esq.

Los Angeles, California, Friday, January 31, 1947,
10:00 A. M.

(Case called by the clerk.)

Mr. Townsend: Ready for the defendant.

Mr. Fitting: We are ready.

Mr. Townsend: Will the court indulge us just for a moment, please?

The Court: Yes.

Mr. Townsend: Ready for the defendant, your Honor.

The Court: Mr. Fitting, I notice the United States Attorney did not sign the waiver of trial by jury.

Mr. Fitting: We have no objection to it.

The Court: The defendant's waiver of trial by jury has been approved by the United States Attorney and by the court. Are you ready to proceed, gentlemen?

Mr. Townsend: We are ready to proceed, your Honor.

The Court: Very well. The defendant is in court?

Mr. Townsend: The defendant is present in court.

The Court: William G. Kelley?

Defendant Kelley: Yes, sir.

The Court: Proceed, gentlemen.

Mr. Fitting: Mr. Franzen. [3*]

CHARLES FRANZEN,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Charles Franzen, F-r-a-n-z-e-n.

Direct Examination

By Mr. Fitting:

Q. Mr. Franzen, by whom are you employed?

A. By the Post Office Department of the United States Government.

Q. In what capacity?

A. Assistant superintendent of mails.

Q. I beg pardon?

A. Assistant superintendant of mails in charge of the night tour at the Terminal Annex.

Q. And Terminal Annex is located where?

A. Macy and Alameda Streets, Los Angeles.

Q. In the City of Los Angeles. Are you familiar with the third floor of the Terminal Annex?

A. Yes; I am.

Mr. Fitting: I ask that this (diagram) be marked as Government's Exhibit for identification No. 1.

The Clerk: The diagram will be marked 1 for identification. [4]

The Court: I will interrupt at this time to hear an ex parte matter.

(Interruption for other court proceedings.)

Q. By Mr. Fitting: Mr. Franzen, have you studied this diagram which has been marked Government's Exhibit No. 1 for identification?

A. Yes; I have studied that.

(Testimony of Charles Franzen)

Q. Is that a fair and accurate representation of the third floor of the Terminal Annex station?

A. Of that section; yes, it is. That is only a section of it, you understand.

Q. What particular section is that?

A. That is the southwest corner of the third floor.

Q. The southwest corner of the third floor.

Mr. Townsend: I am sorry to interrupt. Will you speak just a little louder so that I can hear you, please?

The Court: Did you get the last answer, Mr. Townsend?

Mr. Townsend: I got a portion of it and it faded out.

The Court: Read it, Mr. Reporter, please.

(Question and answer read by the reporter.)

Q. By Mr. Fitting: Mr. Franzen, directing your attention to December 21, 1946, do you remember anything unusual occurring on that day? A. Well, yes.

Q. I show you Government's Exhibit for identification [5] No. 2—

The Court: Has that been identified in the record?

The Clerk: No; it has not, your Honor. Which is a wrapped package with paper and colored flowers, and addressed to "Mrs. E. Johnson, 1706 South Hoover, Los Angeles," and bearing cancelled United States postage stamps.

Q. By Mr. Fitting: Mr. Franzen, I hand you this package which has been marked for identification as Government's Exhibit for identification No. 2 and will ask you when you first saw that package?

A. I first saw this package at five minutes after 5:00 in the morning of December 21, 1946.

(Testimony of Charles Franzen)

Q. That is five minutes after 5:00 a.m.?

A. Yes, sir.

Q. And where did you see it?

A. In the inspector's office at the Terminal Annex.

Q. Which inspector? A. Mr. French's office.

Q. And Mr. Theo French, is it?

A. I don't know his initials. Inspector French.

Q. French, Mr. R. E. French?

The Court: He said he did not know his initials.

Mr. Townsend: We will stipulate it is Mr. French, the postal inspector.

The Court: Do you accept the stipulation? [6]

Mr. Fitting: Yes, sir.

The Clerk: This wrapper from a package bearing a six-cent cancelled United States postage stamp, bearing address to "Mrs. A. S. Cluff, 2026 South Burnside Avenue, Los Angeles, California," is marked 3 for identification.

This box without any writing upon, approximately five inches square, will be marked 4 for identification. Do you want the contents identified, too?

Mr. Fitting: No.

Mr. Townsend: If your Honor please, I think, perhaps for clarity, it might be more advisable, if counsel intends—that is, if they have relations to each other, that they be offered as one exhibit, if that is intended, or unless they have separate relationship.

Mr. Fitting: Oh, I think it is all right the way they are, your Honor.

The Court: Just so they are properly identified.

(Testimony of Charles Franzen)

Q. By Mr. Fitting: Now, Mr. Franzen, I hand you Government Exhibits for identification 3 and 4 and ask you if you have ever seen them before?

A. Yes. When I first saw this it was in one package; it was wrapped up.

The Court: By "this" what do you mean?

The Witness: Well, these two pieces.

The Court: Exhibits 3 and 4 for identification? [7]

The Witness: Yes, sir.

Q. By Mr. Fitting: In other words, Exhibit 4 was wrapped up in Exhibit 3?

A. Yes, sir; that is right.

Q. Did you see them at the same time?

A. At the same time that I saw Exhibit 2; at the same time and place.

Q. What did Mr. French say to you on that occasion?

A. He asked me to please—

Mr. Townsend: Just a moment. I object to that as being hearsay. It was not in the presence of the defendant.

The Court: No foundation laid. Sustained.

Q. By Mr. Fitting: Mr. Franzen, at that time did Mr. French give you any instructions?

A. He asked me to place these two packages—

Mr. Townsend: Just a moment, just a moment. I object to that, if the court please. Up to now it is purely irrelevant as to what instructions this gentleman received.

The Court: It is a preliminary question. Overruled. Did he give you any instructions?

The Witness: Yes, sir. He asked—

(Testimony of Charles Franzen)

The Court: No. You have not been asked what the instructions were. You have been asked only: Did he give you an instruction? Your answer is?

The Witness: Yes. [8]

Q. By Mr. Fitting: What were those instructions?

A. He asked me to place—

The Court: Just a moment. Do you have an objection?

Mr. Townsend: Yes; the same objection, if the court pleases. Up to now there is no relevancy to this case.

The Court: What is the purpose of the offer?

Mr. Fitting: If the court please, it is just to show by the man who put out these packages.

The Court: You are attempting to show oral facts?

Mr. Fitting: I am just attempting to show where the packages were put.

The Court: You are not attempting to prove the truth of what was said?

Mr. Fitting: No, sir.

The Court: Only the facts of what was said?

Mr. Fitting: No, sir; I am not offering it for hearsay purposes.

The Court: For that purpose—

Mr. Townsend: I would like to be heard on this observation, if your Honor pleases. What instructions this gentleman may have gotten from Mr. French to put these packages at some particular place would have no relation on its face with the defendant here or any of the issues in the charge.

Mr. Fitting: Let me withdraw the question, your Honor.

The Court: The question is withdrawn. [9]

(Testimony of Charles Franzen)

Q. By Mr. Fitting: What did you do with the packages, Mr. Franzen? A. I placed these—

Mr. Townsend: Just a moment. The same objection arises. What he did with them still has no connection with this defendant. He is not in the picture yet.

The Court: Overruled.

A. I placed these packages on the third floor. This one—

Q. By Mr. Fitting: You are referring to Exhibit 2 now?

A. Exhibit 2, in the Pico local paper section. That is where papers and small parcels for Pico district are worked.

Mr. Fitting: Mr. Franzen, suppose you mark on this diagram the place where you put this package, Exhibit No. 2.

The Court: By "this diagram" you are referring to Exhibit 1 for identification?

Mr. Fitting: To Exhibit 1, your Honor.

Will you please mark with an "A" the approximate place that you placed it?

A. (The witness marking on diagram.)

The Court: That identification has been marked in the upper left-hand corner of Exhibit 1 for identification, is that right? [10]

Mr. Fitting: Yes, your Honor; just above the writing "Pico Heights Station."

The Court: "Pico"?

Mr. Fitting: "Pico Heights Station."

The Court: It is a letter "A", is it?

Mr. Fitting: Yes, your Honor.

The Court: Very well. The record will be clear.

(Testimony of Charles Franzen)

Q. By Mr. Fitting: Now, you say that you placed that package where you have marked the letter "A", Mr. Franzen? A. Yes, sir.

Q. Did you put it on the floor?

A. No, sir. I put it on a sack rack.

Q. Would you describe to the court what a sack rack is?

A. Well, it is a rack, a platform about eight inches above, or so, a foot above the floor, and there is a metal rack on there in which the mail bags are hung.

The Court: What part of the rack did you put it on?

The Witness: I put it on the wooden platform.

Q. By Mr. Fitting: What is the purpose of that wooden platform, Mr. Franzen?

A. Well, I guess just to support the metal structure of the rack.

Q. What did you do with the other package, Exhibits [11] 3 and 4?

A. I put this package back in the station E, paper section, on a tray.

Q. Would you please mark on Government's Exhibit for identification No. 1 where you placed that, Mr. Franzen?

(Witness indicating on Exhibit 1 for identification.)

Q. Would you mark that with a "B"? Now, you have markel in the lower left-hand corner of the diagram the letter "B"? Just above the words "station E"?

A. That is right.

Mr. Townsend: That is indicating where he placed which exhibit, now?

Mr. Fitting: That is where he placed Exhibits 3 and 4.

Mr. Townsend: Thank you.

(Testimony of Charles Franzen)

Q. By Mr. Fitting: Mr. Franzen, on what did you put that package?

A. I put that on a tray. Oh, it is a tray about four feet long and a foot and a half wide, on castors.

Q. How high is it?

A. It is about a foot and a half high.

The Court: How deep is it?

The Witness: Well, the part that holds the mail, I would say is six inches deep.

Q. By Mr. Fitting: What is that tray used for?

A. We pick up our mail out of the cases and roll it [12] around to the different stations to work it, and work it off of these trays into the cases.

Q. Was there other matter in that tray when you placed the package in it?

A. Well, there might have been two or three small papers there.

Q. Then what did you do, Mr. Franzen?

A. I left and went on about my business.

Q. Mr. Franzen, what was the next time you went back in that area?

A. It was between 5:30 and 5:40, I would say. Mr. French called me and asked me to go back in the Pico section and see if that first parcel, Exhibit 2, was still there.

Q. Still on the sack rack?

A. That is right. And he asked me to rub my hand through my hair if the parcel was gone.

Q. Did you find the parcel? A. No.

Q. Then what did you do, Mr. Franzen?

A. I left.

(Testimony of Charles Franzen)

Q. What was the next time that you went back in there? A. I would say about 5:45.

The Court: These are all a. m. hours, are they?

The Witness: Yes, sir. About 5:45 Mr. French called me again and said that apparently this janitor—
[13]

Mr. Fitting: Never mind what he said, Mr. Franzen.

Q. He asked you to come back, did he?

A. Yes, sir.

Q. What did you do then?

A. I went back, watched the hamper. I wanted to see where it went.

Q. Just a second. What is a hamper?

A. A hamper is a basket on castors. It is about four feet long, probably two and one-half or three feet wide, and about three feet deep.

Q. What is it used for?

A. Well, we use them to put mail in, but in this instance the janitor was using it to put the trash from the floor and sweepings from the floor in.

Q. You say you saw a hamper? A. Yes, sir.

Q. Where did you see that hamper?

A. Well, when I went back this time, the janitor was just pushing the hamper around the corner.

Mr. Townsend: Just a moment. I object to the answer as not responsive and move it be stricken.

Mr. Fitting: Mr. Franzen, would you—may I withdraw that question?

The Court: The motion is granted.

Q. By Mr. Fitting: Mr. Franzen, would you mark on [14] here where you saw that hamper? Would you mark with the letter "C" where you saw the hamper?

(Testimony of Charles Franzen)

(Witness marking on diagram.)

Q. You have marked the letter "C" about a little to the left and above the center of the diagram over the words "Eagle Rock Station"? A. I have.

The Court: The diagram is Exhibit 1 for identification?

Mr. Fitting: Yes, your Honor.

Q. Was anyone pushing the hamper, Mr. Franzen?

A. Yes.

Q. Who? A. Mr. Kelley.

Q. By Mr. Kelley you mean the defendant sitting over there? A. Yes, sir.

Q. Then what did Mr. Kelley do?

A. He left the hamper there and went back in the Station E paper section in that vicinity.

Q. He went back to the area around where you have marked "B" on this diagram? A. Yes, sir.

Q. Government's Exhibit No. 1. What did you do, Mr. Franzen?

A. I was watching that hamper to see where it went, [15] and about that time one of the foremen came and told me that Mr. French was looking for me. So I—

Mr. Townsend: I move to strike that out, what someone told him.

Mr. Fitting: If your Honor please, it is obviously not offered for any hearsay purpose. It is just to show why he left that area.

The Court: It is not offered to prove the truth of what was said?

Mr. Fitting: That is right, your Honor.

The Court: But to prove what happened?

Mr. Fitting: That is right.

(Testimony of Charles Franzen)

The Court: An oral fact. For that purpose only the objection is overruled and the answer will stand.

Q. By Mr. Fitting: Then what did you do, Mr. Franzen?

A. One of the foremen came up and told me that Mr. French was looking for me. So I—

Mr. Townsend: Just a minute, just a minute. I am sorry. I also move to strike that as not responsive to the question. No part of the answer is responsive to the question.

Mr. Fitting: Would you just answer the question, please, Mr. Franzen?

The Court: Motion is granted.

A. Well, I started to look for Mr. French then. [16]

Q. By Mr. Fitting: And you left this area then?

A. That is right.

Q. When was the next time that you came back in that area?

A. We came back about five minutes later, I would say getting close to 6:00 o'clock.

Q. When you say "we" who do you mean?

A. Mr. French and I.

Q. And how did you approach the area?

A. Well, we came in from the north aisle. I will have to show you on that diagram.

Q. All right.

A. We came in this way, around here.

Q. In other words, you came in—

A. Down this aisle here, and we went down here.

The Court: The witness indicates from the top of the diagram, Government's Exhibit 1 for identification, the first open space from the left-hand side.

(Testimony of Charles Franzen)

Q. By Mr. Fitting: You went down that aisle and then where did you go?

A. Went down this aisle and went in here.

Q. Now, you are pointing to the general area we placed the mark "B"? A. That is right.

Mr. Townsend: May I interrupt? Pardon me, counsel. [17] I want to get, at least, if we can, for clarity a sort of sense of direction here on this diagram. It would be which direction?

The Witness: Well, this is north.

Q. By Mr. Fitting: The top of the diagram is north?

A. Yes, sir. We came south, down in here.

The Court: You came south and turned toward the left into the space toward the left side of the diagram; is that correct?

The Witness: Well, it would be our right as we came down.

The Court: The southwest corner area. Would you call that the southwest corner?

The Witness: That is right; that is the southwest corner.

Q. By Mr. Fitting: What did you see there, Mr. Franzen?

A. Mr. Kelley was standing about here.

Q. Now you are pointing to a space quite a ways below the point marked "B"? A. Yes.

Q. But still in the same section of the post office?

A. That is right.

Q. What was he doing, Mr. Franzen?

A. Just standing. [18]

(Testimony of Charles Franzen)

Q. Then what did you do?

A. Mr. French asked me if the parcel I had put on the tray here—

Q. You are pointing to the point marked “B” on this Exhibit No. 1?

A. That is right. He asked me if that was gone.

Mr. Townsend: Just a moment. I am sorry. May I interrupt again and have the question re-read?

The Court: Please read the question, Mr. Reporter.

(Question and answer read by the reporter.)

Mr. Townsend: Just a moment. I want to move to strike that answer as not responsive to the question asked.

The Court: The answer just last read is stricken. Motion granted.

Mr. Fitting: May I withdraw the question, your Honor?

Q. Then what occurred, Mr. Franzen?

A. Mr. French asked me if the parcel, Exhibit—what is it, 2?

Q. Exhibit No. 3 and 4.

A. 2—or 3 and 4, that is right—3 and 4 were here, if 3 and 4 was where I had placed it, and the parcel was not there.

Q. You looked? A. I looked.

Q. And it was not there. Then what occurred? [19]

A. Well, Mr. French started to talking to Mr. Kelley.

The Court: I was not there, Mr. Franzen. What did he say?

The Witness: He asked him where that parcel was that was in the tray.

(Testimony of Charles Franzen)

Q. By Mr. Fitting: What did Mr. Kelley say?

A. Well, I don't know. He told me to go and get the—

Mr. Townsend: Just a moment. May I move to strike everything after the words "I don't know"? If he did not know, he could not say what it was.

Q. By Mr. Fitting: After you—

The Court: Just a moment. Had you finished your answer?

(Witness nodding.)

Q. By Mr. Fitting: You did not hear what Mr. Kelley said? A. That is right.

Q. You did not hear it.

The Court: The motion is granted.

Q. By Mr. Fitting: Then what occurred, Mr. Franzen?

A. Mr. French told me to get the foreman of the janitors, which I did.

Q. Who is that, do you remember?

A. Mr. Kinny, I believe his name is. [20]

Q. Mr. Kinny. You got the foreman of janitors?

A. Yes, sir.

Q. The two of you came back?

A. That is right.

Q. Then what happened?

A. Then we got the hamper from here.

Q. You are referring to the hamper at location "C"?

A. That is right.

Q. Mr. Kinny and you got the hamper?

A. That is right.

(Testimony of Charles Franzen)

Q. Then what did you do?

A. We brought it down here where Mr. French and Mr. Kelley was.

Q. Then what occurred?

A. We started looking through the hamper for these parcels.

Q. Who did, Mr. Franzen?

A. Mr. French, first, and he couldn't find it. He started pawing through it. And he said, "It is apparently down a little deeper. We will strike it."

Mr. Townsend: Just a moment. I move to strike that last answer from "apparently".

The Court: Yes. Motion granted.

Q. By Mr. Fitting: You started looking through the hamper, you and Mr. French? [21]

A. We dumped it out on the floor finally.

Q. Who dumped it out?

A. Well, Mr. Kinny dumped it out on the floor, I believe, and we started looking through the trash for these parcels.

Q. Did you find them?

A. I found this one intact.

Q. You are now referring to Government's Exhibit No. 2?

A. That is right. And then—

Q. What else did you find in there?

A. Then I found this.

Q. You are now referring to Government's Exhibit No. 4?

A. 4, that is right.

Q. For identification.

A. And then we found this.

Q. Now you are referring to Government's Exhibit No. 3 for identification?

A. That is right.

(Testimony of Charles Franzen)

Q. Mr. Franzen, directing your attention to Government's Exhibit No. 2, when you found that was that in the same condition as it was when you placed it on the Pico rack?

Mr. Townsend: Just a minute.

A. Yes.

Mr. Townsend: I object to that question as being irrelevant. There is no connection whatsoever, certainly [22] nothing anywhere close as to what was the cause of its being in the changed condition, even assuming that it was true. I think the question, without stating the situation, is doubly irrelevant.

The Court: Overruled. You may answer.

A. Yes; Exhibit 2 was in the same condition as when I placed it on the Pico rack.

Q. By Mr. Fitting: Mr. Franzen, is that exhibit still in the same condition as it was when you placed it on the Pico rack?

A. Except for these initials on here; yes.

The Court: What initials?

Q. By Mr. Fitting: Would you explain to the court what those initials are?

A. These initials below here are my initials. I put my initials on this parcel to identify it.

The Court: Read the initials.

The Witness: "C. O. F."

Q. By Mr. Fitting: When did you put those on?

A. Well, I put those on down at the inspector's office, later.

Q. After you had found the package?

A. Yes, sir.

(Testimony of Charles Franzen)

Q. On the same morning?

A. Not on the same morning; no. [23]

The Court: You are referring to the initials in the upper left-hand corner of Exhibit 2 for identification?

The Witness: Yes, sir.

Q. By Mr. Fitting: Are there any other initials on that package, Mr. Franzen?

A. Yes, sir; there are. I can't read them. They are not my initials.

Q. Were you there when they were placed on that package? A. No; I was not.

Q. And on the back are there some initials, too?

A. Yes; there are initials on the back. Those are not my initials.

Q. Except for those initials, that package is in the same condition? A. That is right.

Q. Now directing your attention to Government's Exhibits for identification 3 and 4, are they in the same condition as they were when you put them in Station E?

A. No. When I put these in Station E they were wrapped in one parcel. I didn't see this at all when I put it down there.

The Court: That is the box, Exhibit 4 for identification?

The Witness: That is right.

The Court: It was wrapped in the wrapper, Exhibit 3 for [24] identification; is that what you mean?

The Witness: Yes, sir.

Q. By Mr. Fitting: Now directing your attention to the wrapper, Exhibit 3, that, again, has some initials on it, does it not, Mr. Franzen? A. Yes, sir.

(Testimony of Charles Franzen)

Q. Were those initials on there when you placed that wrapper on the table in Station E?

A. No; they were not.

Q. Are your initials on there, Mr. Franzen?

A. Yes, sir; right here, "C. O. F."

Q. You are referring now to the initials in the lower left-hand corner of the front of the wrapper?

A. That is right.

Q. Are your initials also on this box marked Government's Exhibit No. 4?

A. Yes, sir; they are my initials.

Q. And they are in the upper left-hand corner, are they?

A. Yes, sir.

Q. That is "C. O. F."?

A. That is right.

Q. When did you put your initials on Exhibits 3 and 4, Mr. Franzen?

A. I put my initials on there sometime later, down in [25] the inspector's office. I don't know just when.

Q. Mr. Franzen, when you testified that you went into this place marked "A" on Government's Exhibit 1 to see if the package that you had put there was still there—

A. That is right.

Q. —when you went there did you see the defendant Kelley anywhere?

A. No; I did not see him.

Q. Did you hear him?

Mr. Townsend: Just a moment.

A. Yes; I heard him.

Mr. Townsend: Just a moment. I object to that question. It certainly calls for a conclusion of the witness.

Q. By Mr. Fitting: Have you known the defendant Kelley for a long time, Mr. Franzen?

A. Yes; I have known him for several years.

(Testimony of Charles Franzen)

Q. Do you know his voice? A. Yes.

Q. Have you heard him singing?

A. At different times.

Q. Would you recognize him if you heard him singing? A. I would down at the Terminal Annex.

Q. Now, on this morning of December 21st when you went back to the place marked "A" on Government's Exhibit No. 1 did you hear the defendant Kelley? [26]

A. Yes, I heard him.

Q. Was he singing? A. Yes; he was singing.

Q. Could you tell where he was singing?

A. He was back in—

Mr. Townsend: Just a moment. I object to that as calling for a conclusion of this witness.

The Court: Yes. In that form, sustained. Where did the sound appear to come from?

The Witness: It appeared to come from back in the Station E paper section where I had placed the other parcel.

Q. By Mr. Fitting: That is the place that has been marked by you "B" on Government's Exhibit No. 1?

A. Yes, sir; in that approximate area.

Mr. Fitting: That is all.

Cross Examination

By Mr. Townsend:

Q. Now, Mr. Franzen— A. Yes, sir.

Q. —with regard to the location of this singing that you heard, where were you at the time in relation to the diagram on the board? A. Right in here.

(Testimony of Charles Franzen)

Q. Indicating approximately how many feet south from [27] the entry to the floor?

A. From where did you say?

Q. From the entry to the floor. You entered from the north, I think you testified, did you not?

A. Not this time; no. I came straight down this aisle.

Q. You came from the east, this side? A. Yes.

Q. With regard to the west wall where were you?

A. To the west wall? Well, I would say about 35 feet.

Q. About 35 feet from the west wall?

A. Yes, sir.

Q. And where, approximately, did this music come from? A. This singing came from down in here.

Q. And that was approximately how far from where you were in terms of feet south?

A. That is about 28, 30—oh, I would say 45 to 50 feet.

Q. And what, if any, obstructions to your vision between the point where you were standing and the point from which the music was coming?

A. These cases.

Q. How high are the cases?

A. Oh, about seven feet I would say.

Q. Higher than you could see over? [28]

A. Oh, yes.

Q. How low do they extend toward the floor?

A. Oh, they are on legs; about two and one-half feet, I would say.

Q. From where you were standing could you see under them?

A. I could if I got down and tried.

(Testimony of Charles Franzen)

Q. Did you at that time see under them?

A. No.

Q. From where you were could you see around them?

A. No.

Q. Down 45 feet? A. No.

Q. Now, you say that you can quite easily identify the music of the defendant if in the Annex. Could you explain why the ability to hear particularly at one place, but perhaps not at another.

A. Well, If I would hear somebody singing on the street, where there are thousands of people around, maybe I wouldn't recognize Kelley; but back down at the Terminal Annex, where I have heard him for years and I knew he was in the immediate vicinity, I recognized his voice.

Q. Now, you have thousands of people in the post office, do you not?

A. Well, not back there at that time in the morning. [29]

Q. This was around Christmas time, was it, December 21st? A. That is right.

Q. That was about the time when your Christmas rush is at about its peak, isn't it?

A. That is right; that is just about the peak.

Q. So, at that particular scene, you would in all likelihood have more people in and about the place at that time than any other usual time of the year; isn't that right?

A. Yes; but they were not in that section at that time.

(Testimony of Charles Franzen)

Q. How do you particularly identify this music so uniquely as being that of Mr. Kelley's?

A. Well, I have heard him around there for years and I have heard him singing around there before.

Q. Would you say he was a good singer?

A. Oh, just ordinary.

Q. Just ordinary. And yet you particularly—strike that for the moment. Did you ever hear anybody else sing around there, of all of these thousands of employees?

A. Oh, sure.

Q. You hear music, in fact, all about the building?

A. Is that a question?

Q. That is a question. You hear people and singing from one part of the building to the other where you go?

A. Yes, sometimes; not a great deal of it. [30]

Q. Do you hear singing with any reasonable degree of regularity? A. No.

Q. But you do hear it, you would say, reasonably often? A. Once in a while; yes.

Q. From persons other than Mr. Kelley?

A. Yes.

Q. In the light of the comparative voices or abilities of the others that you heard, how would you particularly be able to know uniquely Mr. Kelley's?

A. Well, as I said before, I know Mr. Kelley's voice.

Q. The question is "how"?

A. Well, that is a question that is pretty hard to answer.

Q. He was 45 feet away, I think you have testified, and no possible visibility— A. That is right.

Q. —over, below or around?

A. That is right.

(Testimony of Charles Franzen)

Q. Now, I think it is a rather serious question as to how you know he was the defendant. Was he singing loudly? A. Oh, yes; he was singing loudly.

Q. How loud?

A. Well, loud enough for me to hear him.

Q. And what was the quality of his voice; was he a [31] tenor singer, bass singer, or where would you classify him among the singers?

A. Well, I would say he is pretty bass.

Q. Bass? A. Yes.

The Court: Were there other people around there at that time?

The Witness: There were about three or four mail handlers hanging sacks at that time.

The Court: In this general section indicated on the diagram, Exhibit 1 for identification?

The Witness: Where my mark "A" is there, there were three or four mail handlers hanging sacks.

The Court: Any other people in that section at that time?

The Witness: No; not in the immediate section.

Q. By Mr. Townsend: What do these diagrams here represent? What are these?

A. Those are paper cases.

Q. Are there any of the personnel of the employees working at these cases at that hour of the morning?

A. No. As I just told your Honor here, there were three or four mail handlers hanging sacks.

Q. And where were they with regard to the diagram here? A. By the mark "A". [32]

Q. They were up in here? A. Yes.

(Testimony of Charles Franzen)

Q. That would be north of where you were standing?

A. North of where I was standing.

Q. That is what I am asking.

A. No. Directly west of where I was standing.

Q. Directly west? A. That is right.

Q. You were here and they were there?

A. No. Let me show you. I was standing here, just about here, and they were in here.

Q. Working in between? A. That is right.

Q. Were they working to this diagram or to this?

A. Oh, I don't know particularly. They were in here in this immediate section.

Q. I mean do you know the type of work they were assigned to do right at that point?

A. Yes. They were hanging sacks on these sack racks.

Q. Where were the sack racks, right in the middle of the floor? A. Yes; scattered around in there.

Q. I see. Do you know how many of them that there were working about those sacks?

A. There were three or four. I don't know exactly. [33]

Q. Were there any others working down at the aisle next south of your first diagram, between the two?

A. No; there were not.

Q. Do you know whether or not there were any working on down in the southwest corner area?

A. I couldn't see anyone down there. As far as I know, there was no one there. I couldn't see.

(Testimony of Charles Franzen)

Q. You were there during that morning or sometime during this transaction, were you not?

A. Oh, yes. When I went back there, there was no one there.

Q. Just you and Mr. French and the defendant?

A. Mr. Kinny was there.

Q. And Mr. Kinny? A. That is right.

Q. Anyone else? A. No.

Q. You went or were called to the office of Mr. French around 5:00 o'clock in the morning; and you stated that you were given some instruction with regard to certain packages which are on exhibit, is that correct?

A. Yes.

Q. At the time when you were given those instructions did you know where the defendant was?

A. No. [34]

Q. Had you seen him during the course of that working day? A. No.

Q. What were your working hours on that date?

A. Well, I start at 9:00 o'clock and I stayed around until 7:30 or 8:00 o'clock. My regular working hours are 9:00 to 5:30, but during Christmas I stayed around.

Q. Is that 9:00 in the evening until 5:30 in the morning? A. Yes, sir.

Q. And you had been on that night since 9:00 o'clock the evening before? A. Yes, sir.

Q. Do you know what the working hours of Mr. Kelley were? A. No.

Q. But you had not seen him at all during the entire night prior to this hour in the morning?

A. Yes; that is right.

(Testimony of Charles Franzen)

Q. Had you heard him singing any time during the night prior to that time in the morning?

A. No, no.

Q. Now, I think you stated that you had some conversation with Mr. French in Mr. French's office?

A. Yes. [35]

Q. What was the substance of the conversation, that is, relative to these packages?

A. Well, he told me that he had two packages here, and he asked me to place the packages on the third floor, this Exhibit 2 in the Pico paper section, and this one in the Station E paper section.

The Court: Exhibits 3 and 4?

The Witness: Exhibits 3 and 4.

Q. By Mr. Townsend: At that time, I think you testified, Exhibits 3 and 4 were one, is that right?

A. That is right.

Q. Exhibit 4 being wrapped in 3?

A. Yes; that is right.

Q. And when you later found it, I think you found it among the trash after this hamper was dumped out by Mr. Kinny?

A. That is right.

Q. Is that right? A. That is right.

Q. Was it still one, that is, still wrapped?

A. Yes.

Q. This 3 and 4? A. No. It was not wrapped.

Q. It was then unwrapped?

A. That is right. [36]

Q. Now, I think you stated the first package, that is, Exhibits 3 and 4, I believe, were placed upon a sack rack?

A. That is right.

(Testimony of Charles Franzen)

Q. Is that right? Resting on some wooden post or platform? A. That is right.

Q. Approximately how high is that post from the floor, from where this rack stands on the floor?

A. Approximately, oh 15 inches.

Q. And was it loaded with sacks at the time?

A. No; there were no sacks on the rack.

Q. Was this one of the sack racks that you speak of at which three or four people were working in that area?

A. Not at that time. There was no one working there when I placed the package.

Q. In the same area in which you mentioned a moment ago that there were three or four people working?

A. Where I made the mark "A".

Q. This is "A"? A. That is right.

Q. Were the same three or four people working in this area when you put the package at this point?

A. No; there was no one working there.

Q. That was approximately five minutes past 5:00?

A. 5:10. [37]

Q. 5:10 in the morning and no one was working there? A. That is right.

Q. Are you familiar with the work hours of the employees who work in this area? A. Yes, sir.

Q. At this hour of 5:10 do they have a scheduled working time to be in this area?

A. Oh, sometimes they are working there at that time, but this particular morning they were not.

Q. Do you know where any of them were?

A. Do I know where they were at that time?

Q. Yes. A. Yes, I know where they were.

(Testimony of Charles Franzen)

Q. Did you know personally any of the persons who were in this area when you later came back there?

A. Well, they were Christmas temporary people, but I don't know them personally.

Q. Did you see any of them when you came to put the package at this point?

A. No; I didn't see any of them.

Q. Had there been anyone working at this general area throughout the night prior? A. Yes, sir.

Q. In the handling of mails you have janitors working, cleaning up the floors, all through the night, do you? [38]

A. No. They don't work back there.

Q. You don't have janitors sweeping back there?

A. Not that time of night.

Q. Do you have them any other time of night?

A. In the morning they start sweeping.

Q. About what time? A. About 5:00, 5:30.

Q. This is 5:10; so this would be in the hours that the janitors would be there, is that right?

A. Well, I don't assign the janitors to the sweeping. I don't know what their hours are, but I know they start in the morning.

Q. In other words, you don't know anything about the janitors as to their assignment, as to when they are due or at what place?

A. That is right; I don't know anything about it. I have nothing to do with it at all.

Q. You have no information concerning it?

A. Only what I see on the floor.

Mr. Fitting: If your Honor please, this cross examination is obviously beyond the scope of the direct examina-

(Testimony of Charles Franzen)

tion. Mr. Franzen has not testified that he knows what the janitors do, I think, Mr. Townsend.

The Court: There is no question pending. Put your next question. [39]

Q. By Mr. Townsend: The question is: That you don't know whether or not there were one janitor or 10 janitors in that area about that same hour of the morning, other than Mr. Kelley, do you?

A. Only what I saw.

Q. They could have been there without you seeing them, I take it? A. Yes; they could have.

Q. Now, you placed a second package on a tray?

A. Yes, sir.

Q. I think you testified about six inches deep in the mail container. Where was that tray?

A. Where I have that "B" marked down below there. That is right.

Q. That is "B". Did you go directly from "A" to "B"? A. Yes; I did.

Q. With the two packages? A. Yes; I did.

Q. In going that way, you passed these two intervening work obstructions?

A. Yes, sir; went around there.

Q. Was there anyone working at either side of these areas when you were coming from here down to there?

A. No.

Q. Now, did you see the defendant at any time at any [40] of these points between here and down there?

A. No.

The Court: You mention "from here to there" and there is nothing in the record to show what you mean.

(Testimony of Charles Franzen)

Mr. Townsend: From "A" to "B". I am sorry. Indicating from "A" to "B".

A. No; I didn't see him, not on that first trip.

Q. In fact, you did not see the defendant at all on that first trip? A. No.

Q. Then it was some 40 minutes later before you returned to the same area, is that right, 5:45, I think, to be exact?

A. No. I went back there, I said, between 5:30 and 5:40 to see if that parcel which I placed at the spot "A" was still there.

Q. I think your testimony was that you—

The Court: Do not argue the question, Mr. Townsend. Just put your next question.

Q. By Mr. Townsend: Did you not testify that Mr. French instructed you to go back there at exactly 5:45 a. m.? A. No; I didn't.

Q. Where were you during the intervening period between this 5:10 and approximately 30 minutes later that you came back? [41]

A. Oh, I was about my business in other parts of the building.

Q. And were you where you could get any view at all of this general area that is in question?

A. No.

Q. Did you leave the floor completely during that period? A. Possibly. I don't remember.

Q. You don't recall where you were?

A. I was in other parts of the building. I am in charge of the entire building.

Q. And at no time up to this point had you seen the defendant at all? A. Up to what point?

(Testimony of Charles Franzen)

Q. That is leading up to the return at somewhere around 5:40.

A. I saw him get off the elevator on the third floor shortly after I placed the packages there.

Q. Approximately what time would you say that was?

A. Oh, possibly 5:20 a. m.

Q. 5:20 you saw him getting off the elevator?

A. I said, "approximately."

Q. Now, approximately how long was it in terms of minutes after you saw him getting off the elevator and when you came back and saw him at the next time on the floor? [42]

A. The next time I saw him was when he rolled the tub, his hamper, around where I have the mark "C".

The Court: About how long was that after?

The Witness: I would say that was, oh, 30 to 40 minutes.

Q. By Mr. Townsend: About 30 to 40 minutes after you saw him getting off the elevator, when you next saw him pushing the hamper at point "C"?

A. That is right.

Q. Or at or about point "C"?

A. That is right.

Q. And the time that you saw him get off the elevator was a time subsequent to the time when you had placed the package at "A" and the package at "B"?

A. That is right.

Q. Is that right? A. That is right.

Q. Approximately how long was it after you had made the two placements that you saw the defendant get off the elevator? A. Five or 10 minutes.

Q. Five or 10 minutes? A. Yes, sir.

(Testimony of Charles Franzen)

Q. So that you would approximate an outside time of about 45 or 50 minutes between the two situations, that is, when you placed them there and when you saw the defendant? [43]

The Court: By "here" you mean at point?

Mr. Townsend: At point "C"?

A. Yes; that is right.

Q. And during that entire interval you were at some other point, at some other part of the building?

A. Yes, sir. Not the entire interval, because, as I said before, I was sent back there once to see if the parcel which I had placed at "A" was still there.

Q. And what time was that?

A. I said between 5:30 and 5:40, approximately; and I was sent back again to watch that hamper.

Q. You were sent back again. At the time you were sent back to see whether or not the packages were there—

A. Yes.

Q. —did you go to or look at the places where you placed them? A. Just where I placed—

Q. "A"? A. Yes.

Q. Point "A"? A. Exhibit 2, yes.

Q. Would that be point "A"? A. That is right.

Q. You looked at point "A" where you placed the first package? [44] A. That is right

Q. Did you observe the floor? I think you stated this is about six inches from the floor where you placed it, I believe, approximately? A. Well, about 15 inches.

Q. About 15 inches from the floor? A. Yes.

Q. Did you observe the floor in that area?

A. Yes. I looked very closely for that package.

(Testimony of Charles Franzen)

Q. In observing the floor did you notice whether or not it had been swept or cleaned between the time that you placed the package there and the time you came back?

A. No; I didn't pay any particular attention to it.

Q. You made no observation with regard to whether or not it had been serviced by the janitor?

A. No; I didn't. That is right; I didn't.

Q. When did you next look at point "B"?

A. Well, when Mr. French and I went back there, getting close to 6:00 o'clock.

Q. Was the package at that point, at this tray, I believe you called it, when you got there?

A. No; it was gone.

Q. Did you observe the floor and the general area about there?

A. I was looking for the package. [45]

Q. Did you observe whether it had had janitorial service since your last appearance?

A. No. No; I didn't observe that.

Q. When the janitors clean up in these areas, they clean from the top of these things down to the floor, don't they? That is their responsibility, is to sweep—

A. No.

Q. —dust and what not down?

A. I have nothing to do with the instructions which the janitors get, but I would—my opinion would be no.

Q. Do you have any different sets of people who clean these racks that you have in the diagram here and those that sweep the floor?

A. I have nothing to do with that branch of the service.

(Testimony of Charles Franzen)

Q. And, therefore, you have no recollection?

A. No.

Q. Do you know which way the defendant was going when you first observed him with the hamper?

A. When I first observed him with the hamper I just saw him come around the corner there.

Q. In which direction, coming from which way and going which way?

A. Well, he came from the south and went around that pillar; that round circle there is a pillar.

Q. That is, he came from the south, this way? [46]

A. Yes. He came—I saw him come around this corner and stop there. I was standing down here, quite a ways down. I saw him come around like this and stop.

Q. Where were you, approximately, in terms of feet from the east wall of the floor where you were standing?

A. From the east wall of the floor?

Q. From the east wall of the floor, indicating on the diagram here.

A. Oh, that is—I would say I was approximately 75 feet from here down this way.

The Court: "From here" you mean what?

Q. By Mr. Townsend: From point "C" where you were standing? A. That is right.

Q. And you saw the defendant coming from the—

A. Saw him come around the corner. That is all I could see.

Q. The west aisle, from a southerly direction, going north? A. That is right; that is right.

Q. And then turn east? A. That is right.

Q. Is that correct? A. Yes, sir.

(Testimony of Charles Franzen)

Q. In other words, you saw him on the turn? [47]

A. That is right.

Q. You at no time saw him at point "A", did you?

A. No.

Q. That is, up to this point of time?

A. I never did see him there.

Q. And at no time did you see him at point "B"?

A. I never saw him there; no.

Q. At some later point, you and Mr. French, I think you said, were there at the scene together. Approximately how long was that after you first saw the defendant?

A. It was about nearly 6:00 o'clock when we went back there together.

Q. After you saw the defendant first turn this corner at "C" then what did you do or where did you go?

A. I stayed there until a foreman came up and told me that Mr. French was looking for me. So—

Q. Approximately how long did you stand there before your attention was called to something else?

A. Oh, I was there probably five or 10 minutes.

Q. And during that period of five or 10 minutes did you observe the defendant at that point "C"?

A. No. He pushed his hamper around and then he left.

Q. Did you observe whether or not he had anything else in the way of working tools aside from the hamper?

A. Oh, he had a broom and he had a dust pan hanging [48] on the side of the hamper.

Q. What kind is it? One of these push brooms would you say? A. That is right.

Q. And a dust pan? A. That is right.

(Testimony of Charles Franzen)

Q. Did you observe a hand broom?

A. No; I didn't.

Q. Which direction did you observe him go when he left his hamper at point "C"?

A. He went back, around the pillar and went south again.

Q. That is, turned the corner back in the same direction from which he came? A. That is right.

Q. Then you did not see him any more until after you had gotten in the company of Mr. French?

A. That is right.

Q. Now, approximately how long before you and Mr. French came back together?

A. Oh, you mean from the time I left to find Mr. French?

Q. From the time you received instructions from some gentleman that Mr. French was looking for you. From that point down to the point that you came back with Mr. French, [49] about how long in terms of minutes?

A. About five minutes.

Q. About five minutes? A. Yes, sir.

Q. And where did you and Mr. French first go when you came back into the general area?

A. We went through the passageway on the north side of the building to that—well, I had better show you on the diagram. We came across up here. I met Mr. French about here. He went across the passageway here and went down here like this.

Q. When you came from the point north to south when did you next see the defendant?

A. He was back here.

(Testimony of Charles Franzen)

Q. That is, where you first saw him when you were with Mr. French? A. That is right.

The Court: You are referring to—

Mr. Townsend: A point that is the southwest corner area.

The Court: A point below the place where you marked “B”?

The Witness: That is right, your Honor.

Q. By Mr. Townsend: About how many feet is it in this area between “B” and the south wall? [50]

A. Between “B” and the south wall—well, let’s see. There is about—it is 28 feet from the center to center of those pillars; so I would say it is about 25—35 to 40 feet—about 40 feet.

Q. About 40 feet. And from about this westerly aisle to the west wall, would you approximate that about the same distance? A. That is about 40 feet.

Mr. Fitting: If the court please, I suggest that they mark that place. Then it would be easier to find.

Q. By Mr. Townsend: Would you mind marking where the defendant was standing? I think you said he was standing in that area. A. Right in here.

Q. You might mark—A, B, C, D—D, I imagine. We have no letter “D”, if you will. So the defendant was standing about the letter “D” when you and Mr. French came back to that area, is that right?

A. That is right.

Q. Did you observe where the defendant’s hamper was standing? A. Still back here.

Q. Still at point “C”? A. That is right.

(Testimony of Charles Franzen)

Q. Did you observe when you came around here what the [51] defendant was doing?

A. Well, he had a piece of paper in his hand, rolling it up.

Q. Did he have his working tools, his broom and his other working equipment?

A. I don't remember if he had his broom with him or not. I know he didn't have his dust pan, because that was on the side of the hamper; and I don't remember where the broom was.

Q. Did you observe what he was doing when you and Mr. French came up?

A. He was standing there with a piece of paper in his hand, rolling it up like this.

Q. Now, I think you testified that you and Mr. French immediately approached the defendant, is that correct?

A. First, we went to see if this parcel which I placed at "B", that is, Exhibits 3 and 4, was still there where I placed it.

Q. So that, then, was the first time you had went back to take a second observation as to the second point where you placed a package?

A. Yes.

Q. After having looked there, then what happened with regard to you and Mr. French and the defendant?

A. Mr. French asked me if the parcel was still there. [52] I said, "No; it is gone." He approached Mr. Kelley and asked Mr. Kelley what he did with that parcel that was there. And he told me I had better go back and get the janitor foreman, which I did.

Q. And I think it was at that point that you stated that Mr. French began talking with Mr. Kelley and that you left?

A. That is right; that is right.

(Testimony of Charles Franzen)

Q. So that you no longer knew what happened?

A. That is right.

Q. Now, you went and got Mr. Kinny, is that right, the foreman?

A. Yes, sir.

Q. After you had gotten back on the scene with Mr. Kinny, then what took place with regard to the three of you and the defendant?

A. Mr. French started looking through the hamper. First, I got the hamper. I got the hamper and brought the hamper back here right below point "B".

Q. About point "B"?

A. About point "B". Mr. French started looking through the hamper for these parcels, Exhibits 2 and 3 and 4, and he didn't find them. So then Mr. Kinny dumped the trash out on the floor, emptied it all out and we started pawing through that. And I first found Exhibit 2, and then [53] one of us—I don't remember who—found this Exhibit 4. And then I found Exhibit 3, this wrapper.

Q. Now, approximately how much trash was in this hamper?

A. Oh, the hamper, I would say, is so long, so high and so wide, and it was two-thirds full.

Q. Two-thirds full, indicating that some trash had been picked up from somewhere?

A. Yes.

Q. I think you testified these two packages were found rather deep down in the trash near the bottom after you had turned it upside down?

A. Well, we dug down in a ways and couldn't find it; so it must have been down pretty well towards the bottom.

(Testimony of Charles Franzen)

Q. Do you have an incinerator here in this building where hampers are taken when they are filled with trash?

A. That is not my business at all.

Q. Do you know whether or not such a fact exists?

A. Yes; they bring trash down in the basement.

Q. Do you know whether or not they have a man in the incinerator, assigned to the exclusive duty of sifting trash for possible parcels being lost within it or accidentally picked up within it? A. I don't know.

Mr. Fitting: I object to that, your Honor, on the ground that it is not Mr. Franzen's duty and it is irrelevant [54] and immaterial.

The Court: He may tell what he knows about it. Overruled.

A. I do know that at times there is a man assigned in the basement to go through this trash; but, as I say, that is not my duty and I don't know if there is a regular man there or just what is the schedule or anything about it. I know the trash is sifted, though, gone through.

Q. By Mr. Townsend: Isn't it just more or less an ordinary thing, Mr. Franzen, that during the Christmas rush period when the mails are extra heavy, that a small parcel like this is quite often picked up in the trash by a janitor sweeping? A. Yes; sure they do.

Q. And is that not the specific purpose for which such a man would be assigned to that incinerator to sift the trash? A. Yes.

Mr. Townsend: That is all.

Mr. Fitting: That is all.

The Court: You may step down, Mr. Franzen. We will take the morning recess at this time of five minutes.

(Short recess.)

(Testimony of Charles Franzen)

Mr. Townsend: If your Honor please, I should like to ask the witness just about one or two more questions.

The Court: Very well. [55]

Q. By Mr. Townsend: Mr. Franzen, can you describe the conditions of light back in this area of the floor about that time of morning?

A. Which time do you specify, now?

Q. I am speaking of between the hours of 5:00 and 6:00 in the morning.

A. Well, we have the overhead lights. You mean whether the lights were on or not?

Q. Whether they were bright or dim, whether they were on in full or they were just partially lighted at that hour in the morning.

The Court: At that time of year is there total darkness outside?

The Witness: No, no. At that time in the morning the lights were—well, I will show you on this chart. We have overhead lights approximately here. These lights were on in here. This area here was well lighted. Pretty dark back in here.

The Court: Are you referring to the area around the "A"?

The Witness: That is right. That was well lighted here; it would be well lighted in here; but the lights in here were off. It would be pretty dark.

The Court: You are referring to the area west of "A"?

The Witness: West of "A"; yes, sir. [56]

The Court: Against the west wall?

The Witness: Yes, sir. But this was not lighted.

(Testimony of Charles Franzen)

Q. By Mr. Townsend: Not all the lights were lighted? A. That is right.

Q. And the same condition prevails with regard to area "D" and area "B"?

A. Of course, those lighting switches were just on these posts and people have to switch them on and switch them off. If a man wants to work back in here, they switch the lights on. The janitors come in and they switch the lights on in the morning when they sweep. When they get through working they switch them off. The lighting varies and conditions are not always the same.

Q. Do you know whether the lights were on or off when you went to place the packages there, that is, all the switches? A. When I put them there?

Q. Yes; at 5:10.

A. These lights in here were on.

Q. That is, the aisle lights; you are referring to the aisle lights?

A. Yes. And the lights down in here were off. I turned the lights on, placed my parcel, and turned the lights off and left.

The Court: You refer to the area "B"? [57]

The Witness: Yes, sir.

Q. By Mr. Townsend: Area "B" and area "D", is that right? A. Yes, sir.

Q. When you came back the first, that is, the time you were standing some 75 feet west of point "B" and saw

(Testimony of Charles Franzen)

Mr. Kelley arriving at point "C" what were the state of the lights back in the area at that time?

A. The lights were on here and here, and we have men working back in here, hanging sacks, as I said before, and they had these lights on.

Q. And down in area "B" and "D", or did you observe?

A. I do not recall what the condition of the lights was there.

Q. You are not familiar with the janitors' instructions at all? A. No.

Mr. Townsend: I am sorry. That is all.

Mr. Fitting: Mr. French.

ALFRED E. FRENCH,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Counsel has handed me two photographs. The photograph of the interior of the building which bears [58] the word "Pico 6" has been marked 5 for identification. The photograph of the interior of a building with an arrow pointing to a table upon which apparently papers or something similar are situated is 6 for identification.

Direct Examination

By Mr. Fitting:

Q. By whom are you employed, Mr. French?

A. By the Post Office Department of the United States.

Q. In what capacity? A. Post office inspector.

(Testimony of Alfred E. French)

Q. Did you see the defendant, Mr. Kelley, on the morning of December 21st? A. I did; yes, sir.

Q. Did you see the packages which have been marked for identification as Government's Exhibits 2, 3, and 4 on the morning of December 21st? A. Yes, sir.

The Court: Is that 1946?

Mr. Fitting: 1946.

Q. In both cases, 1946?

A. That is correct; yes, sir.

Q. Was that the first time that you had seen those packages?

A. No, sir. The packages had been around in our office [59] previously.

Q. Do you know who prepared those packages?

A. Yes, sir.

Q. Who did?

A. Post Office Inspector Ray Shore. Post Office clerk Harvey Surdam, and I.

Q. Directing your attention to Government's Exhibit No. 2, was that in substantially the same condition as it was when you prepared it? A. It is; yes, sir.

Q. Directing your attention to Government's Exhibits Nos. 3 and 4, are they in substantially the same condition as when you prepared them, you and the other gentlemen prepared them?

A. Except that they were all one piece at the time they were prepared and sealed with this heavy Scotch or heavy brown sticker tape.

Q. Did you personally see Exhibit No. 4 wrapped in Exhibit 3? A. I did; yes, sir.

(Testimony of Alfred E. French)

Q. Are there any identifying marks on Exhibit 4 by which you can be sure that is the package that you wrapped in Exhibit 3? A. Yes.

Q. Would you please point out to the court what those [60] identifying marks are?

A. On the inside of this box there is a capital S written in with a pen and ink in the inside corner of the box.

Q. Who wrote that letter there?

A. Inspector Ray Shore.

Q. In your presence? A. Yes .sir.

Q. On the morning of December 21st you had those packages in your possession, did you? A. Yes, sir.

Q. What did you do with them?

A. At five minutes after 5:00 Mr. Franzen came to my office and I handed the two packages intact to him.

Q. Did you give him any instructions?

A. Yes, sir. I instructed Mr. Franzen to place Exhibit No. 2 on the wooden platform of a sack rack in the Pico Heights station area where I would be in such position that I would be able to keep it under observation; and Exhibit No. 4, with Exhibit No. 3 wrapped securely around it, I requested him to place on a table in the Station E circular and small package distribution section.

Q. Then what did you do?

A. I then proceeded to go to the observation gallery on the third floor.

Q. Mr. French, would you please mark on Government's [61] Exhibit No. 1 the location of the observation gallery?

A. Yes, sir. The observation gallery runs from this point at the upper edge of Exhibit No. 1 for a number of feet in an easterly direction.

(Testimony of Alfred E. French)

Q. Is that the part of the diagram that is marked "Lookout over"? A. That is correct; yes.

Q. Where did you go in that observation gallery?

A. I went to this point right here.

Q. Will you please mark that "E"? A. "E".

Q. And that is on the westerly corner of the—

A. That would have been over slightly. May I erase that and put it over slightly? Just about in line with the eastern end of this Pico Heights Station case; about right here.

The Court: Mark it dark enough, Mr. French, so we can see it. I cannot even see the mark you have made from here.

Mr. Fitting: I am putting a circle around it, your Honor.

The Court: Very well.

Q. By Mr. Fitting: The place that is marked "E" with a circle around it is the spot where you went in the lookout gallery? A. That is correct. [62]

Q. Approximately what time did you arrive there, Mr. French? A. About 5:15 a. m.

Q. Directing your attention, Mr. French, to Government's Exhibit for identification No. 5—

A. I should have—may I correct that, please? It was about 5:10 a. m. It took me about five minutes to arrive there.

Q. Directing your attention to Government's Exhibit for identification No. 5, is that an accurate representation of the view of the floor of the post office from that observation gallery? A. It is; yes, sir.

Q. Looking straight out from the observation gallery?

A. Looking south directly.

(Testimony of Alfred E. French)

Mr. Townsend: If the court please, I am sorry to interrupt, but I think I will have to object to that. I think the best evidence would be either the person who took the picture, or I think it would be his conclusion in looking at the picture.

The Court: He may say whether or not it is a fair representation of what he could see or what was there.

Mr. Fitting: It is just intended, your Honor, to show the general layout of the floor and what could be seen from there. [63]

The Court: Put your next question.

Mr. Townsend: If your Honor would like me to state what I had in mind, it is that from the point he was standing and the point the camera took that picture might be two totally different locations, which would give us a totally different approach.

The Court: The question is: What could be seen from the point where he was standing, point "E"? Was that your question?

Mr. Fitting: Yes; it was, your Honor.

The Court: Proceed.

Q. By Mr. Fitting: Mr. French, there is an arrow on this diagram pointing down to "A"—

The Court: An arrow on the photo, Exhibit 5 for identification.

Mr. Fitting: On the photo, Exhibit 5, pointing down to a rack, is there not?

A. That is a sack rack; yes, sir.

Q. Is that the approximate location of the sack rack on which Government's Exhibit 2 was placed?

A. It is; yes, sir.

(Testimony of Alfred E. French)

Q. And you could see it just as clearly as that from—

A. That is correct.

Q. Now, Mr. French, did you see— [64]

The Court: You mean from point “E”; is that what you are asking? You did not complete your question. You said, “you could see it just as clearly as that from”—where?

Mr. Fitting: From point “E”.

The Court: Point “E”?

The Witness: That is correct.

Q. By Mr. Fitting: Mr. French, did you see Mr. Franzen place Government’s Exhibit 2 on that sack rack in the Pico Heights area at point “A”?

A. I did; yes, sir.

Q. You saw him do that from the lookout?

A. I did; yes, sir.

Q. Then what did you see him do?

A. I then saw him take Exhibits 3 and 4 down the aisle and turn in, turn west at the point of entrance into the Station E.

Q. In other words, you saw him turn to his right in toward the spot on the diagram marked “B”?

A. Yes, sir.

Q. Then did you see him put down the package?

A. I do not recollect noting that point apparently.

Mr. Townsend: I am sorry, I didn’t get the question and answer.

The Court: Read the question and answer, Mr. Reporter.

(Last question and answer read by the reporter.) [65]

(Testimony of Alfred E. French)

Q. By Mr. Fitting: Did you then stay in the lookout shelter, Mr. French?

A. I did, but I changed my position.

Q. And where did you move to?

A. I moved to the back side of point "E", which is perhaps three or four feet, so that I would face north and observe the janitors' closet.

Q. You would be looking towards the north, you say?

A. Yes.

Q. In other words, the opposite direction from which you were looking before? A. That is correct.

The Court: You were looking to a point not shown on the diagram?

The Witness: Yes, sir.

The Court: Exhibit 1 for identification?

The Witness: That is correct; yes, sir.

Q. By Mr. Fitting: Did you then see the defendant Kelley?

A. I saw him, yes, within a short while, about 5:15 a. m.

Q. Where did you see him?

A. I saw him go in the janitors' closet, which is just below and a few feet north of my lookout point.

Q. At a point not shown on our diagram? [66]

A. Yes, sir.

Q. What did he do?

A. He conversed there for a few minutes with—may I say, that at that time I didn't know that he was Kelley, but the man that I later learned to be Kelley I saw then.

Q. The defendant sitting here?

A. That is correct. I saw him conversing with another colored man in the janitorial service.

(Testimony of Alfred E. French)

Q. Then what did the defendant Kelley do?

A. Kelley obtained his broom, walked over to the corner just west of that point.

Q. Just west of what point, Mr. French?

A. Of the janitors' closet.

Q. Still off the diagram?

A. That is right; yes. I saw him take his broom over there and start sweeping.

Q. What direction did he sweep, Mr. French?

A. He swept from the wall that is on the west side of the building, east, out into the aisle.

Mr. Townsend: Will you plot that, if you will, on the diagram?

Q. By Mr. Fitting: Was he sweeping at a place show on this diagram?

A. No. That was in Holly station. which would be just off the diagram. [67]

Mr. Townsend: Just a moment. I am sorry to interrupt. I wonder if we can have the witness just take a pencil and follow the course of Mr. Kelley.

The Court: It is not shown on the diagram, Mr. Townsend, he said.

Mr. Townsend: Oh, we are still up in the other section. I am sorry.

The Court: He swept at a point north of the point shown on the diagram.

Q. By Mr. Fitting: Mr. French, would you point out the place where Mr. Kelley first swept into the diagram?

A. Well, he was sweeping in a rather easterly direction here.

The Court: From the west wall?

(Testimony of Alfred E. French)

The Witness: From the west wall; yes sir. And before he swept the material up into where the diagram begins.

The Court: That would be the northwesterly corner of the diagram, would it. Exhibit 1?

The Witness: Yes, sir. Well, he would have come into the diagram, but it would have been directly under the gallery here. And then he left there.

Q. By Mr. Fitting: When did you see him next?

A. I saw him go around, take the nearest route in order to get to the men's lavatory.

Q. And when did you see him again, Mr. French?
[68]

A. I followed down the observation gallery to a point where I could observe the lavatory. and I saw Mr. Kelley in there and observed him there for several minutes.

Q. When did Mr. Kelley next appear in the area around your lookout, Mr. French?

A. When he left the lavatory, which was perhaps about 10 minutes later, and he spent about 10 minutes in there.

Q. Approximately what time was that?

A. That would have been about 5:30.

Q. And what did he do then?

A. Then he started sweeping his pile of trash south up to—

Q. Suppose you draw a dotted line in the direction in which he was sweeping his pile.

(Witness diagraming on Exhibit 1 for identification.)

The Court: The witness commenced drawing the dotted line from the point west of the point marked "E" in the upper left-hand corner of Exhibit 1 for identification.

(Testimony of Alfred E. French)

The Witness: That is correct. It should have been—there is a trash pile, of course. I couldn't see it too well underneath the gallery there. It was more like this, along this aisle here. down to approximately this point just south of the southernmost case in the Pico Station.

The Court: That is a point east of the point marked "A"? [69]

The Witness: That is correct; yes, sir.

Mr. Fitting: Suppose you mark that point "X".

The Court: Make it "F". "F" is our next letter.

Mr. Fitting: "F". And I will put a circle around that, your Honor, so it stands out.

Q. What did Kelley do when he got to the point "F"?

A. He came in to this Pico Heights Station section.

The Court: By going west?

The Witness: By going west; yes, sir, approximately southwest. And the first thing that I noted him do was to walk up to the sack rack, which was about at this point here.

Q. By Mr. Fitting: That is just south of point "A"?

A. Just south and west of point—yes; just south of point "A", and picked up Exhibit No. 2.

Q. Now, Mr. French, could you see Exhibit 2 clearly at that time? A. I could; yes, sir.

Q. The lights were on in that vicinity so that it was bright? A. Very clear; yes, sir.

Q. And you say that Mr. Kelley picked up Exhibit 2 from the sack rack? A. That is right; yes, sir.

Q. Then what did he do?

A. He looked at it a moment and then he swung his [70] body all the way around to the right and threw the package in the direction of his trash pile.

(Testimony of Alfred E. French)

Q. Now, you have indicated that he pivoted around to his right and turned a half circle? A. Yes, sir.

Q. And then he threw the package in the direction of the trash pile? A. That is correct.

Q. Did he start sweeping again then?

A. The next thing he did was to push the racks, the sack racks—there were several of them there—up together more compactly, and then he swept that area. Well, first, before sweeping the area, after pushing those racks together, he proceeded to empty two wastepaper baskets there onto his pile of trash, and then obtained some sweeping compound to throw over the pile and then he swept that area out.

Q. That is, he swept—

A. The Pico Heights area.

Q. —the Pico Heights area, that is, the general area?

A. Yes, sir.

Q. In which this mark “A” is?

A. That is correct.

Q. He swept that out towards what, into the aisle?

A. Yes, sir. [71]

Q. Into the pile marked “F”?

A. That is right.

Q. Then what did he do?

A. Then he pushed that pile of trash up the aisle.

Q. Now, when you say “up the aisle” you mean south?

A. South in the aisle.

Q. In the same direction that he had been pushing it before? A. That is correct.

(Testimony of Alfred E. French)

Q. With his broom?

A. Yes; to a point just approximately in this area here, the "Wilshire-LaBrea-Village and West Los Angeles Station" area.

Mr. Fitting: The witness is now drawing a dotted line south down the aisle.

The Court: South from point "F".

Mr. Fitting: South from point "F".

The Witness: Shall we mark that "G"?

Q. If you will. Will you put a circle around that?

A. Yes.

Mr. Fitting: And he has marked a spot "G" slightly above and to the right of the words "VIL-WLA STA"?

Q. Then what did Mr. Kelley do, Mr. French?

A. He then swept out this area which is surrounded by the stations, stations or distribution sections, which [72] you just mentioned.

Q. You mean the area to the west of point "G" on the diagram?

A. Yes. He swept that out to this same pile at point "G". and then he swept that pile south down the aisle and—

Q. Would you mark with a dotted line his course?

A. Yes.

Q. You are now drawing a dotted line south down the aisle from point "G"?

A. Correct; yes, sir. I saw him turn in at approximately the point "H"—I will put a circle around it.

Q. And you have now marked point "H" at a place almost due east of point "B" but out in the aisle?

A. That is correct; yes, sir.

(Testimony of Alfred E. French)

The Court: By "turning in" do you mean turned west toward the wall?

The Witness: Well, he turned west toward the wall; yes, sir.

Q. By Mr. Fitting: He began to sweep the pile in there, did he? A. Yes, sir.

The Court: Had you seen Exhibit 2 for identification from the time you say the defendant threw it toward his trash pile up until this time when he swept the pile in towards the wall near point "B" [73]

The Witness: No, your Honor. I was unable to observe the package in the large amount of trash and papers which were in the pile.

The Court: Did you see it at any time from the time you say the defendant threw it up until the time you saw him turn toward the west wall at the point "H" with his trash pile?

The Witness: No, sir; I did not.

Q. By Mr. Fitting: Mr. French, what happened then?

A. I waited at the observation point "E" for a few moments, and then I telephone Mr. Franzen, the supervisor in charge of the building at the time, and asked him—I told him that the defendant, whom I later learned to be Kelley, had turned in into the Station "E" area at the southwest corner of the building, and instructed him to come out and see if he could find the package which he had placed at point "A". I believe that is "A", isn't it? Yes.

Q. Did you see Mr. Franzen go to the point "A"?

A. Yes. And I forgot to mention, I told him to make a motion as though he were scratching his head if he

(Testimony of Alfred E. French)

could not find the package when he arrived there. So I saw him come into that section and observe closely in every direction from the point where he had left the package, and then he stood there a moment and scratched his head, indicating to me that he could not find the package. [74]

Q. Then what did he do?

A. He then left the section and, as far as I could see, he appeared to return in the direction of the north end of the building.

Q. When did you next see the defendant Kelley?

A. I next saw the defendant about 5:45. I left the lookout gallery and went down through my office and around to the stairway in about the middle of the building, which is—

Q. Are you speaking of this?

A. No; I am not speaking of that, but the area near the tie section, which would be off the diagram and to the north of the point "E".

Q. Then did you go from there to a point on the diagram?

A. I did. I circled around on the third floor there over to the east side of the building, and then south along the floor to a point opposite where the elevator is shown. Stairway No. 1, I believe they call it.

Q. In other words, you came across the floor, moving toward the west until you hit a point just below stairway No. 1?

A. Yes; approximately this point here, from which I could look into the station "E" distribution area here.

(Testimony of Alfred E. French)

Q. Now, Mr. French, would you please mark the point at which you stopped? [75]

A. That would be "I".

Q. "I". Would you put a circle around that?

A. Yes.

Q. Point "I" is in about the middle of the diagram toward the bottom, just below the portion of the diagram marked "ELEV NO. 1" and "ELEV NO. 2"?

A. Yes.

Mr. Townsend: May I interrupt there, please, counsel? I wonder if you would help us out by running a dotted line across? I mean it is a rather round-about way and I am trying to follow it.

The Witness: Well, a portion of it would be off the diagram.

Mr. Townsend: Well, I mean where you hit the diagram. Just start where you got on the diagram.

The Witness: There is a fire path area over here next to the east line of the building.

Mr. Townsend: Indicating the northeast corner of the diagram?

The Witness: That is correct.

Q. By Mr. Fitting: I take it, Mr. French, that you came down on the east side of the diagram somewhere?

A. That is correct.

Mr. Townsend: Just a moment, just a moment, counsel. I object to that as leading. [76]

A. I believe that that would be—I believe that this diagram would probably take in the entire width of the building there. Assuming that to be the case, I came down along through this area here.

(Testimony of Alfred E. French)

Q. By Mr. Fitting: In any event, you came down a place well out of sight? A. That is correct.

Q. From the area we have been discussing?

A. In order that the defendant would not be able to see me.

Mr. Townsend: Just a moment. I am not just clear.

I am trying to find out, if I can, exactly where you came into this diagram, at what point. Will you mark an "X" or something exactly where you came into the picture, into the exhibit?

The Court: In the eastern district?

Mr. Townsend: Anywhere that he first came into this diagram that we have on the board.

The Witness: It is not sufficient to say that I came down the east side of the building?

Mr. Townsend: Yes. But where did you come into it?. Where did you get onto this first floor, at what point?

The Witness: Approximately at this point here.

Mr. Townsend: That is what I am trying to get at. Then follow that course. [77]

Q. By Mr. Fitting: Will you draw a dotted line there to point "I"?

Mr. Townsend: Which "I"? That is what I am trying to get at.

The Witness: This will only be an approximate, because I—

The Court: Let us mark the point, first. What is your next letter?

Mr. Fitting: J.

The Witness: "J". I will circle that.

The Court: The witness has marked a dotted course along toward the easterly side of Exhibit 1.

(Testimony of Alfred E. French)

The Witness: That, as nearly as I can tell from the diagram there, is the direction which I came in.

The Court: You made a dotted line from "J" to "I"?

The Witness: Yes, sir.

Q. By Mr. Fitting: Now, Mr. French, I show you the photograph which has been marked Government's Exhibit for identification No. 6 and ask you whether that is a fair and accurate picturization of what you saw from point "I" on the diagram?

Mr. Townsend: Just for the record, if the court please, I make that same objection as I made with regards to the previous picture. I think the person who took the picture would be the best evidence. [78]

The Court: Ask him if it fairly depicts the scene that he could see at that time when he reached point "I". Is that your question?

Mr. Fitting: Yes, your Honor.

The Court: Objection overruled. You may answer.

A. It does; yes, sir.

Q. By Mr. Fitting: What did you see. Mr. French?

A. I saw the defendant bending over the trash hamper and—

Q. Now, by trash hamper just what do you mean?

A. I mean this canvas tub which is generally used by the janitors in depositing their trash before taking it down to the basement.

Q. Was that the first that you had seen that hamper?

A. No. No; I had seen Kelley before I left the look-out gallery and I—

Mr. Townsend: I object to that, if your Honor please, as not responsive to the question.

A. No. I—

(Testimony of Alfred E. French)

The Court: Overruled. He may answer.

Q. By Mr. Fitting: When did you first see the hamper?

A. I saw the hamper at just before leaving the look-out gallery.

Q. Was that after Mr. Franzen had gone into the point marked "A" to look for the package? [79]

A. After Mr. Franzen had been there; yes. That was—to the best of my recollection, that was after Mr. Franzen was in there.

Q. Where did you see the hamper, Mr. French?

A. I saw the hamper being pushed by Mr. Kelley down the aisle in the direction of the Station "E" area.

Q. Did he follow approximately the same course that you have marked by the dotted line as indicating where he swept the—

A. Approximately that course.

The Court: Do you mean "swept the trash pile"?

Mr. Fitting: Swept the trash pile.

A. He was out of my observation for a moment when he went down to get the hamper. I could not see exactly the point.

Q. Where did he go to get the hamper, Mr. French?

A. He came down the aisle north and turned to approximately past the point "C" and went over toward the northeast part of the diagram.

Q. Now, Mr. French, was this also after he had swept the pile past point "H"?

A. That is correct. The pile had already been put into the Station "E" area.

(Testimony of Alfred E. French)

Mr. Townsend: May I interrupt again, if counsel please, to see if we can make a point where the hamper was before [80] the defendant went to get it? I mean may we have a letter at that point?

Q. By Mr. Fitting: Did you see the hamper before the defendant got it?

A. No; I couldn't see. I couldn't observe the point at which he got the hamper.

Q. You saw the defendant go east past point "C"?

A. That is correct.

Q. And then out of your sight?

A. Yes; he got out of my sight.

Q. When he came back he had the hamper with him?

A. That is correct; yes, sir.

Q. And what did he do with the hamper?

A. He pushed it down the aisle which I have previously made a dotted line.

Q. That is along the course "F-G-H"?

A. As I remember, he came back through the point "C", the same point that he had made his exit to go after the hamper. He came back through there again and then into the aisle and then south to the point—is that "H"?

Q. "H". A. Yes.

Q. And then at point "H" he turned west with the hamper? A. That is correct; yes, sir.

Q. As he had with the sweeping? [81]

A. Yes, sir.

(Testimony of Alfred E. French)

Q. Now, Mr. French, to get back to your standing point "I", observing the defendant, what did you see?

A. I observed him bend over the hamper with his back toward the west wall and he was doing something in the hamper. I could not observe just what he was doing.

Q. Did it look as if he were picking up papers and things?

Mr. Townsend: I object to that. He has answered he did not know what he was doing, if the court please.

The Court: You may ask him what he appeared to be doing. Objection sustained to the question put.

Q. By Mr. Fitting: Did it appear that he was picking up papers and putting them in the hamper?

A. No.

Mr. Townsend: Just a moment. I object to that as leading.

The Court: Sustained.

Q. By Mr. Fitting: What did it appear that he was doing?

A. I can only answer that by saying that he was not putting trash into the hamper; and what he was doing, I don't know.

Mr. Townsend: If the court please, I move to strike the answer. If he does not know what he was doing, he doesn't [82] know what he was not doing.

The Court: The answer is not responsive. The motion to strike is granted. The question is, Mr. French,

(Testimony of Alfred E. French)

what, if anything, did it appear to you that he was doing at that time.

The Witness: I could not say what he was doing, your Honor.

Q. By Mr. Fitting: Would you describe to the court his position?

Mr. Townsend: If the court please, I object to that as having been asked and answered. He said he was in a bending position over the hamper.

The Court: Sustained.

Q. By Mr. Fitting: Then what did the defendant do, Mr. French?

A. He was still in that position at the time I left my point of observation.

Q. How long did he stay in that position?

A. I would judge that he was in that position during the period that I watched him for at least a half a minute. I did not stay there long enough to see when he got out of that position.

Q. In other words, you watched him for a half a minute and during the entire period he was bent over the hamper? [83]

A. That is correct.

The Court: We will take the noon recess at this time until 1:30 this afternoon. You are instructed, Mr. Kelley, to return at 1:30. Court will recess at this time until 1:30.

(Whereupon, a recess was taken until 1:30 p. m. of the same day, Friday, January 31, 1947.) [84]

Los Angeles, California, Friday, January 31. 1947,
1:30 P. M.

(Case called by the clerk.)

The Court: Are both sides ready?

Mr. Townsend: Ready for the defendant, your Honor.

The Court: Is the defendant present in court?

Mr. Townsend: The defendant is present in court.

The Court: All right; proceed.

ALFRED E. FRENCH (Recalled)

Direct Examination (Resumed)

By Mr. Fitting:

Q. Mr. French, I believe that when we adjourned you had just testified that you had just left the spot on this diagram marked for identification as Governments Exhibit No. 1, the spot marked "I"? A. Yes, sir.

Q. Where did you go?

A. I walked back in an easterly direction.

Mr. Townsend: I am sorry to interrupt. I can't hear you, sir.

A. I walked east from that particular position back toward the easterly wall of the building. I walked down that way and— [85]

Mr. Townsend: Just a moment. "Down that way" indicating which?

Q. By Mr. Fitting: Did you retrace your route from "I" to "J"?

A. That is right; I practically retraced my previous route, except that I stopped in the placing table section or letter distribution area of the floor and sought to get in touch with Mr. Franzen.

(Testimony of Alfred E. French)

Q. Now, Mr. French, when did you come back into the area covered by this diagram again?

A. It would have been about four or five minutes later.

Q. Who was with you?

A. Mr. Franzen and Mr. Kinny.

Q. Where did you re-enter the area covered by this diagram?

A. Well, as nearly as I can remember, we came down through that area "C" down below, right there, and came through there in the aisle and walked up—

Q. That is, you came down through the center of the diagram past the point marked "C"?

A. That is correct; yes.

Q. And at that point you turned westerly?

A. Yes.

Q. And then when you got into the aisle, turned—

A. South. [86]

Q. —southerly and followed him and went southerly along the path that Mr. Kelley had swept?

A. That is correct.

Mr. Townsend: May I interrupt, counsel, and ask him if he will just dot where he entered the diagram and follow his course?

The Witness: I would not be positive as to the exact course from this area here. As nearly as I can remember, we entered the—

Q. By Mr. Fitting: Would you mark where you entered "K"? A. Probably about this point here.

(Testimony of Alfred E. French)

Q. You are now putting the mark "K" on the very top center of the diagram?

A. That is right. And, as nearly as I can remember, before reaching this aisle here we traversed approximately this route here from the point marked "C" and into the aisle, and where we turned south.

Q. When did you next see Mr. Kelley?

A. While on that route I saw him as soon as I reached the area of—is that an "H"?

Q. Yes.

A. Reached the point "H", where I could see into the area.

Q. Into Station "E"? [87]

A. That is correct; yes, sir.

Q. When you reached that point "H" who was with you?

A. Mr. Franzen was directly with me, and Mr. Kinny, I motioned for him to remain behind for a moment.

Q. You motioned to him to remain behind?

A. That is right; and he was just behind us.

Q. What was Mr. Kelley doing when he first came within your vision there?

A. He was just standing there. I don't really remember. I didn't notice whether he had anything in his hand or not.

Q. What did you do then?

A. I walked up to him and asked him where the package was that had been placed on the table.

Q. Did you check to see if the package was there?

A. I had first asked Mr. Franzen where he placed the package, and he showed me where he had placed it on the

(Testimony of Alfred E. French)

table. And I asked Kelley what he had done with the package.

Q. What did Mr. Kelley say?

A. He said, "What package?"

Q. Did you have any further conversation with Mr. Kelley at that time?

A. Well, I would say that there was some conversation. I sent Mr. Franzen back to bring the trash tub into the area there, and in the course of that time, as I remember it, I [88] told Mr. Kelley that there had been a package there and—

Mr. Townsend: Just a moment. I am sorry. I can't hear you again. It is fading out on me.

Mr. Fitting: Would you keep your voice up, Mr. French, please?

A. Yes. And Mr. Kelley and I discussed the package. He disclaimed any knowledge of it and I asked him several—

The Court: What did he say and what did you say?

The Witness: I do not remember the exact words, your Honor.

The Court: The substance of it, the substance of it.

The Witness: The substance was simply that—

The Court: How did you open the subject with him?

The Witness: I insisted that the package had been there and that now it was gone, and that he must have done something with it. And he displayed ignorance—

The Court: What did he say?

Mr. Townsend: I move to strike that clause, if the court please, that "he displayed ignorance".

(Testimony of Alfred E. French)

The Court: Motion granted. We were not there, Mr. French. You have to tell us what happened if we are to know what happened. .

The Witness: He said that he didn't have any package and wondered what I was—and he asked what I meant by a package and— [89]

Q. By Mr. Fitting: Then what happened, Mr. French?

A. I told him that Mr. Franzen had left a package there on the table and now it was gone; there had been no one else in there and that he must know what had happened to the package; and he denied it.

Q. Then what happened?

A. In the meantime Mr. Franzen had gone after the trash tub and he brought it up, and Mr. Kinny who, I believe, was close enough to observe what was going on, at that time came in and I felt of Kelley's clothing to see whether there was any bulk in there to indicate that he had taken any of the articles out of the packages and placed them in his pockets. I also in the course of the conversation had mentioned the package which had been down on the Pico station and which I saw him pick up from the—

Mr. Townsend: If the court please, may I interrupt and move to strike that last portion of his testimony as voluntary?

The Court: Motion granted.

Q. By Mr. Fitting: Mr. French, did you say anything to Mr. Kelley about the Pico package?

A. Yes; I did.

Q. What did you say?

(Testimony of Alfred E. French)

Mr. Townsend: Just a moment. I object to the whole inquiry into the subject as having totally no connection with [90] this case, of what happened in the Pico station at some different time.

Mr. Fitting: If the court please, that is one of the packages covered in this indictment.

The Court: Why don't you identify it?

Q. By Mr. Fitting: Did you ask Mr. Kelley about the package which has been marked for identification as Government's Exhibit 2? A. I did.

Mr. Townsend: Just a moment.

Q. By Mr. Fitting: What did he say?

Mr. Townsend: Just a moment. That is objected to. First, the court will recall he spoke of some package at some Pico station and—

The Court: Is this the package, Exhibit 2 for identification, which you have referred to as the "Pico package"?

The Witness: That is correct; yes, sir.

The Court: They are one and the same package, evidently, Mr. Townsend. Motion denied.

Q. By Mr. Fitting: When you spoke of the Pico Station, Mr. French, do I understand you to mean this area marked "A" here?

Mr. Townsend: Just a moment. I would like to ask the witness a question on voir dire, your Honor.

The Court: Yes; you may. [91]

Q. By Mr. Townsend: Is this dealing with the same day and time? A. That is correct; yes.

Q. Did this transaction take place at the Pico Station—where did this whole transaction take place?

A. This is a part of the conversation at the—

(Testimony of Alfred E. French)

Q. I am asking you now if this transaction that we have before the court on this diagram—is this a diagram of the Pico Station?

A. A portion of it is, the part marked “A” is the Pico Station area.

Q. That is the Pico Station area in this Terminal Annex Building? A. That is correct.

Mr. Townsend: I see what you mean.

The Court: By that, you mean that is where the mail goes that is destined for delivery in the Pico Street district?

The Witness: Yes, sir.

The Court: In the City of Los Angeles?

The Witness: Correct; yes, sir.

Q. By Mr. Fitting: Mr. French, you said that you asked Mr. Kelley about that package which has been marked for identification as Government Exhibit 2. What did you ask him?

A. I asked him what he did with the package that he had [92] taken from the sack rack.

Q. What did he say?

A. He said that—he denied having taken any package there and said he didn’t know what I was talking about.

Q. Then what happened?

A. By that time Mr. Kinny and Mr. Franzen were right there along with Kelley and myself and the trash tub, and I reached into the trash to see if I could find the packages in it and could not do so at first; and so we decided to turn the hamper upside down and dump all of the trash out onto the floor, and we first found this package in it.

(Testimony of Alfred E. French)

Q. That is Government's Exhibit 2?

A. Exhibit No. 2. And then I think Exhibit 3 was the one that we found next, and then we found the wrapper, or it might have been vice versa, they were found so nearly or close to each other in point of time.

Q. When you found them were they in the same condition—

A. That they are now?

Q. As they are now? A. That is correct.

Q. Now, Mr. French, let us go back to the time when you were in the observation gallery. Did you see anyone go into the general area that is marked on this diagram as "A" between the time that Mr. Franzen went in and put the [93] package there and Mr. Kelley came in and threw it out?

Mr. Townsend: Just a moment. I would like to ask that question be read. I don't get all of it before he answers.

The Court: Please read the question, Mr. Reporter.

(Question read by the reporter.)

A. No one then.

Q. By Mr. Fitting: Now, Mr. French, did you see anyone go into the area marked "A" on this diagram in the period between the time that Mr. Kelley threw the package out and Mr. Franzen came in the second time to see if it was there?

A. Yes, sir. There were—

Q. Who did you see go in that area?

A. There were three or four mail handlers who came in there for the purpose of hanging sacks on the rack.

Mr. Townsend: Just a moment. I move to strike that from the word "purpose". He saw three or four mailmen come in.

(Testimony of Alfred E. French)

Q. By Mr. Fitting: What did they do?

The Court: Motion granted.

Q. By Mr. Fitting: What did they do, Mr. French?

A. They commenced the process of hanging sacks on the various racks a little farther over from the point marked "A" toward the wall. They were not at any time in the immediate vicinity of the point marked "A".

Q. Now, Mr. French, in all the time that you were [94] watching did you see anyone go into the area, the general area, around the spot on this map marked "B" other than Mr. Kelley? A. No, sir.

Mr. Fitting: That is all.

Cross Examination

By Mr. Townsend:

Q. Were you in attendance in the lookout from the time you first saw Mr. Kelley converse with some gentleman whom you did not identify to the time that you finally came down and around to see Mr. Kelley?

A. I beg your pardon? You are speaking of the gentleman he was conversing with when he first came on the floor?

Q. Your testimony was that when you observed Mr. Kelley he was conversing on the north side of the diagram with someone whom you did not identify.

A. Yes; that is correct.

Q. I am questioning you now as to whether you were standing at that particular position in the lookout, is that correct? A. Yes; that is correct.

Q. I am asking you did you stand at that point of lookout continuously from that time down to the time

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when you left to come around to the point to what I believe is "I"? [95]

A. No; I did not. I followed the defendant by moving from point to point in the observation gallery.

Q. Approximately how long were you up in the lookout?

A. I was up there, I would say, about 35 minutes.

Q. You stated that when you first saw the gentlemen conversing, you in fact did not know who they were, as I recall it; and that you saw two men conversing, one of whom you later found to be Mr. Kelley, I think you used the words; is that your testimony?

A. That is correct; yes.

Q. When did you later find this gentleman to whom you refer to be Mr. Kelley conversing previously?

A. When did I find him to be Mr. Kelley?

Q. That is right.

A. Not until I started to questioning him, and I believe that I spoke to him as Kelley, because I assumed that that was who it was.

Q. You assumed that that was who it was?

A. Yes.

Q. I see. You at no time called Mr. Kelley's name at the time that you were in the lookout?

A. Called his name?

Q. Yes; from where you were in the lookout. You didn't call out to him, did you?

A. Oh, no. [96]

Q. He answered by no name?

A. That is correct.

Q. And your first personal identity of Mr. Kelley was at some 30 to 40 minutes later, when you had come back out and gone around this course that you drew on the

(Testimony of Alfred E. French)

diagram and then around to the point beyond; is that the first time that you saw a man that you identified as Mr. Kelley?

A. Well, as a matter of fact I didn't know that he was Mr. Kelley until he signed his name to a statement. I never asked him if his name was Kelley.

Q. He has been there for some years, hasn't he?

A. I don't know—yes; he has.

Q. You knew Mr. Kelley personally before this occasion, didn't you?

A. No. I beg your pardon. I had never seen Mr. Kelley before as far as I know.

Q. When did you first find out that the defendant—that the name Kelley was the person to whom you saw conversing previously with another man that you did not identify? A. I don't understand what you mean.

Q. I mean when did you know that this gentleman, the defendant, regardless of his name, was the same gentleman that you saw from the lookout talking to someone that you did not identify?

A. Well, I followed his movements and I recognized the [97] man who picked up the package and worked there in the area and the man that I finally accused as all being one and the same man, regardless of his name.

Q. What, then, did you take into consideration as points of identification as being the same man that you had previously seen?

A. Well, the fact that he was short and heavy-set, and I had heard him singing underneath the observation gallery and his voice was similar to that with which he spoke when I accosted him in Station "E" area.

Q. You heard the music, also? A. Yes; I did.

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Q. Had you previously heard music from that position?

A. I think that is the first music I ever heard from that position.

Q. So you heard from the point that you heard the music; it came from directly under you, didn't it?

A. Not directly, no; off to one side there a little bit in the corner of the building which I could observe.

Q. At the time that you heard singing could you see who was doing the singing?

A. I could when he first started singing.

Q. I think you testified that when this gentleman came out of the lavatory and went toward this northwest corner and began to sweeping, you lost sight of him from the time he [98] left the lavatory until he reappeared on this side of this lookout, is that right?

A. Yes, sir. It is impossible to observe for the entire route around to the toilet.

Q. How would you estimate the distance of your lack of observation; how wide would you consider the area, I mean, beneath that you could not see between the two points?

A. Well, I haven't much of an idea on that. I don't imagine it would be more than 45 feet around there.

Q. So there was 45 feet from the time you saw him at the north side of the lookout until you saw a man again on the south side of the lookout; is that your estimate?

A. I don't know exactly what you are driving at. I saw him under the lookout and I saw him in the lavatory, and part of the distance between the lavatory and the

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point where I could observe him from the lookout there is a blind distance there of about 40 feet, 45 feet maybe.

Q. You saw a short and slightly fat man on the north side of the lookout, is that right?

A. That is right; yes.

Q. And then you later saw a short and slightly fat man on the south side of the lookout, is that correct?

A. I did later; yes.

Q. At two points that were at least 40 to 45 feet apart, is that correct? [99]

A. Yes.

Q. And while this man that you saw was on the north side did you at any time know who this short fat man was?

A. I only knew that it was he. I didn't know his name.

Q. Did you know the person?

A. I knew him by sight, certainly.

Q. How did you identify the person that you saw on the south side?

Mr. Fitting: If the court please, I think Mr. French has already answered how he knew it was the same person.

The Court: Have you finished your question?

Mr. Townsend: I had not, your Honor.

The Court: Wait until the question is finished.

Q. By Mr. Townsend: Now, the question is: How did you know, that is, what was your basis of identity—

Mr. Fitting: If the court please—

Mr. Townsend: I haven't yet finished the question, counsel.

Q. What is the basis of your identity of the man you later saw on the south side, 45 feet south, that gave to

(Testimony of Alfred E. French)

you the conclusion that it was the same man that you had seen 45 feet to the north?

The Court: Is there objection?

Mr. Fitting: Yes, your Honor. If the court please, I think Mr. French has already answered that question. [100]

The Court: Overruled. He may answer.

A. Well, his clothing and his height and the fact that he appeared to be a custodial cleaner by his actions.

Q. By Mr. Townsend: Describe his clothing, the man to the north of the lookout.

A. Well, you mean the man on both sides. The man on both sides had the same clothing on.

Q. As a matter of fact, every custodial worker has the same uniform, don't they?

A. No; they don't. The man that came up there in that janitorial closet with him had on khaki trousers. Kelley had on blue denim trousers.

Q. You do not have a regulation required uniform that these men in this custodial staff have to wear?

A. No.

Q. Do you have any custodial workers that are low or short in size?

A. Well, there may be some. I am not a custodial supervisor. I would not know about that.

Q. Did you see more than one custodial worker on that job that night through the building?

A. I saw only that night—

Q. That night.

A. You mean that morning. I was asleep during the night. Do you mean that morning at 5:30? [101]

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Q. That morning at 5:30.

A. I saw the—the only two that I saw were Kelley and this man in the khaki trousers.

Q. Are there any lights up in this lookout where you were? A. Any lights?

Q. Lights up inside of the lookout where you were?

A. No. It is pretty dark in there.

Q. Pretty dark. And how much is the area of peeping or looking space that you see through?

A. Well, the slits are, I would say, a half inch wide or thick and about six inches long, and there are a number of those spaced along at, perhaps, two-foot intervals clear along this wall which is shown on the diagram.

Q. What is the number of feet down from the bottom of the lookout to the floor?

A. Well, I am sorry. I don't know that I can give you those dimensions.

Q. Could you estimate it?

A. I would estimate it as being possibly 10 feet.

Q. How far would you estimate the distance to be from the end of this lookout to the west wall, from the west end of the lookout at point "E" to the west wall?

A. I would estimate that to be about 42 feet.

Q. Where is this lavatory? In what general direction [102] north of the diagram is this lavatory located?

A. It is back up here in the northwest corner.

Q. North of the lookout or south of the lookout?

A. Well, you take the lookout and you would go north along the lookout there in order to be able to observe into it.

Q. Is there a seeing opening at the extreme end of the lookout? A. Yes.

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Q. That is one across this end that you can look directly this way? A. That is correct; yes.

Q. I wish you would come and indicate as nearly as you can where the next openings are that you look through.

A. There are openings all along this dotted line here.

Q. Approximately how far are they spaced apart?

A. Perhaps two feet apart.

Q. Two feet apart. Now, in which of the openings were you looking through when you saw a gentleman conversing with another on the north side of the lookout?

A. I believe that would have been right around the corner here, rather than directly across. It was right around the corner here. In fact, I remember looking in that direction on the diagram to look down on that closet. [103]

Q. Don't you know directly the exact window through which you were looking?

A. I looked in all those windows along, just at times, within just a few feet.

Q. I am speaking now of the particular one that you were looking through when you saw two men conversing before going to the lavatory.

A. I would say the one right around the corner there. I believe that is the one; or, as a matter of fact, I think they both look onto that closet.

Q. Now, pointing to this, what does this diagram here represent on the floor?

A. Those are paper and package distribution cases along there, as shown in the photograph.

Q. Calling your attention to the north end of the distribution case identified as Station "H", how far in the

(Testimony of Alfred E. French)

number of feet from this point to the end of the lookout would you estimate?

A. I would say that would probably be about 14 feet.

Q. About 14 feet. And you stated that the looking windows are approximately two feet apart, is that right?

A. I would think that would be about it; yes.

Q. Are they about equidistant on both sides?

A. Yes.

Q. Assuming that to be the fact, you would estimate [104] that would be approximately seven windows along the north side of the lookout between these two points, that is the point "E" and the point indicated at the north end of station "H"? A. Around that; yes.

Q. Now, of those seven windows can you identify any one of the seven that you were looking through at the time you saw the two men conversing, assuming that there are seven?

A. Well, I would say probably it would have been the first window right around the corner on the bend there.

Q. Is there a bend inside the lookout or does it run directly straight?

A. No; it makes a broad right-angle there that you have to follow down to get to the lavatory.

Q. I notice from this diagram it seems to run directly across east-west.

A. It does up to that point, the point—is that an "E" there?—and at the point "E" it makes a right-angle turn.

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Q. How do you enter to get into the lookout, from the way you enter? Where did you enter the lookout itself?

A. I entered the lookout from our office, the inspectors' office.

Q. Which would be approximately where with reference to the diagram or north of the diagram? [105]

A. Well, it is a long ways from there. You have to make several bends and go around quite a long corridor from our office. It would be, however, facing the Union Station plaza on the second floor.

Q. Now, at what point do you enter into the inside of the lookout that you actually get up into the thing?

A. As soon as we get out of the office we are in the lookout.

Q. I beg pardon?

A. As soon as we get out of the office we are in the lookout.

Q. I mean with reference to the diagram. I am trying to get a point now where you first entered here on this diagram here. This is the line that indicates the lookout all the way across, isn't it? A. Yes.

Q. You come to this point here to do your observation. is that correct? A. The point "E".

Q. Approximately the point "E"?

A. That is right.

Q. Where did you enter it before you moved to the point "E" on the inside of the lookout?

A. Well, that would have been some place down in this area here on the second floor. As I say, you have to go up [106] several different corridors to get up there to

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the third floor and made a very circuitous route around there to get here.

Q. This much of it is all on the third floor, isn't it, from this point along to the point "E"? A. Yes.

Q. That is, from a point at the northeast corner of the diagram to point "E", that is all on the third floor, is that right? A. That is correct; yes.

Q. When you got into this third floor part of the lookout where did you enter, at what point on the diagram did you enter?

A. Well, that goes right up continuous from the first and the second, first, second and third floors; and the point that I entered that would be right above the inspectors' office, which is about halfway down in the front of the building.

Q. I wonder if you can just take your pencil and mark where you entered the lookout on the third floor? That is all we are driving at at this point.

The Court: On that portion which is shown on the diagram.

Mr. Townsend: Before you come to the point "E".

A. It would have been around here approximately. [107]

The Court: I do not believe you understand it.

Mr. Townsend: I do not think he does.

The Court: What part of the lookout is shown on that diagram? What is the total part of the lookout which is shown there? Is it all there at the top of the diagram?

The Witness: This is all lookout here, your Honor, from here on around here and up this side here and across; that is all the lookout area.

The Court: You are referring to—

(Testimony of Alfred E. French)

The Witness: I think the place where I entered would be about here, where we come up from the—

The Court: That is in the lower center toward the east side?

The Witness: That is right; yes, sir.

The Court: Will you mark that?

Q. By Mr. Townsend: All of this is third floor; all of this represents third floor lookout, is that correct, up to this corner and then right? A. Yes.

Q. All that is third floor lookout?

The Court: What is that writing between the two lines there?

Mr. Fitting: It says "observation".

Mr. Townsend: "Observation lookout."

Q. So this does represent all the third floor? [108]

A. That is all the third floor; that is right.

Q. What we are trying to get at now is what point are you positive of that you entered and got into that.

The Court: Third floor lookout, is that your question?

Mr. Townsend: That is right.

A. It would have been right about here, because our office is approximately here on the south side of the Terminal Annex Building.

The Court: Do you wish that point marked, counsel?

Mr. Townsend: Yes, sir. I was trying to get exactly where he entered the third floor part of the lookout.

The Court: Please mark the point, Mr. French.

The Witness: You see, this does not show the lookout running from the second to the third floor.

Q. By Mr. Townsend: But where it reaches the third floor is the point I would like to have you mark, at the point where you entered on the third floor.

(Testimony of Alfred E. French)

May I have your pencil, please? I had better not mark that with a pen. I wonder if we could call the building superintendent and have him point it out on the map?

Mr. Fitting: If the court please, I can't see what possible relevancy or materiality it has where he entered the lookout first.

The Court: Please mark as best you can, Mr. French, where you came into the third floor lookout. [109]

The Witness: I was approximately there, your Honor.

The Court: What letter did you put there?

The Witness: The letter "L", your Honor.

The Court: That is east of the stairway?

The Witness: That is right.

The Court: In the lower center part of the diagram, is that correct?

The Witness: Yes, sir.

Q. By Mr. Townsend: After entering here what course did you take—to the west?

A. When I first went up there at 5:10 in the morning?

Q. That is correct. A. Yes.

Q. Then which direction?

A. I believe that course would be westerly and then over near the side of the building and then northerly to the top of the diagram and then westerly to point "E".

Q. Now, would you estimate the number of feet there is from this point where you entered? Is this a letter—

Mr. Fitting: "L".

Q. By Mr. Townsend: At the letter "L" to the west wall—this is the east wall—to the east wall. Just estimate the footage from where you entered until the point at the east wall.

A. Well, I would say that would be about 50 feet. [110]

(Testimony of Alfred E. French)

Q. About 50 feet. Would you estimate the distance from this point at the west wall to this point at the north wall, indicating the northeast corner of your diagram?

A. Well, probably about 70 feet or so.

Q. Then would you estimate the approximate total distance from this point to point "E"?

A. I would say that would probably be around 90 feet.

Q. 90 feet. 50, 70, and 90, is that correct? Is that your estimate?

A. I would estimate it at that; yes.

Q. Then you walked, after you entered the third floor lookout, approximately 210 feet before you reached a point "E", is that correct?

A. If that is the addition of those figures, that would be about correct.

Q. That is your estimate, adding them together?

A. Yes.

Q. What time exactly, if you can recall, did you enter the lookout on the third floor at point "L"?

A. About six minutes after 5:00.

Q. Six minutes past 5:00?

A. Six or seven minutes past 5:00, yes; immediately after Mr. Franzen left my office.

Q. Do you have any recollection as to why that would happen to be the hour? [111]

A. Yes; I have. I had left word with the guard to wake me up at 5:00 o'clock that morning and instructions for Mr. Franzen to call up my office at five minutes after 5:00. Rather, I was awakened at a quarter of 5:00 and Mr. Franzen here called at five minutes after 5:00.

Q. Do you sleep in the building?

A. I did that night.

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Q. And you were awakened at five minutes past 5:00?

A. I was awakened at a quarter of 5:00.

Q. And when did you have this conversation with Mr. Franzen about these packages before he put them at points "A" and "B"? A. At five minutes after 5:00.

Q. At five minutes past 5:00, is that correct?

A. That is right.

Q. And then at 5:06 you were on the third floor lookout?

A. Well, it didn't take long to give him those instructions, a couple of minutes and I gave them to him; yes.

Q. How far would you estimate the distance from your office to the point of entrance of the third floor, point "L", in terms of feet? A. Probably about 15 feet.

Q. About 15 feet. I think you testified that you [112] reached the point "E" at exactly 5:10, is that right?

A. I am quite sure I did not say "exact". I said, "about 5:10."

Q. How long was it from the time you saw—strike that question a moment. From where you stood at point "E" could you see on the inside of the lavatory?

A. No; not from point "E".

Q. That is, you could only see people on the outside of the door of the lavatory?

A. I could not see the lavatory there from point "E". I told you a while ago you had to go around a blind distance.

Q. Does this lookout go up farther to the north than the diagram? A. Yes.

Q. Where does it extend, approximately?

A. It extends from point "E" directly—

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Q. Oh, it turns the corner here and goes north?

A. That is right.

Q. Is that correct? A. That is correct.

Q. I see. You turn the corner and then you can look directly at the lavatory door? A. That is right.

Q. Is that correct? A. Yes, sir. [113]

Q. But at no point can you see inside of the lavatory?

A. Oh, yes. After we get up there to where it looks into the lavatory, we can see into the lavatory. I saw Kelley sitting there for 10 minutes, approximately.

Q. Inside of the lavatory? A. That is correct.

Q. Approximately how many feet from that point is the lavatory, that is, from where you can see from this lookout to the lavatory door?

A. I would say it is about 20 feet.

Q. And this lookout runs directly into and over the actual inside of the lavatory? A. That is correct.

Q. Is that right?

A. It runs right through the lavatory, so to speak. You can see the east side of the lavatory from the point that the lookout runs through.

Q. When you saw the two men conversing, will you identify the other gentleman to whom this short, fat gentleman was talking?

A. I can't identify him. I don't know his name, any more than I knew Kelley's name at that time. He had on a pair of khaki trousers. He was a colored man, fairly young, probably about 25 to 30 years old.

(Testimony of Alfred E. French)

Q. And did you observe the course that he took after [114] the conversation?

A. No; I didn't, because he left, except in leaving there. He either went north in leaving the janitors' closet, but where he went I would not know.

Q. Did he go completely out of your view as he turned north?

A. I believe he did; yes.

Q. And you at no time saw him again?

A. No.

Q. You do not know which way he went?

A. Well. I say, he was going north. That would have been away from me, and I never saw him again.

Q. Did you see him at any time later that morning during this transaction, this other gentleman?

A. No, sir; I never did.

Q. You say that Mr. Kelley while under the lookout, after having come out from the lavatory, was singing, is that right?

A. He was singing during a portion of the time that he was working in there.

Q. Could you identify what he was singing?

A. No.

Q. Could you identify the tone quality of his voice?

A. Well, I am not much of a connoisseur of singing, so I wouldn't be able to say as to the quality. [115]

Q. Do you know a tenor from a baritone or a bass?

A. Well, generally speaking, an exaggerated bass, I would probably know he was a bass and not a tenor.

Q. Among these voices that you heard, would this be a tenor, a baritone, a bass, or what else did you hear?

A. It sounded pretty bass to me.

(Testimony of Alfred E. French)

Q. It sounded pretty bass to me. When the short and slightly fat gentleman later came into your view at the south side of the lookout was the singing still continuing?

A. Well, I had heard the singing over there in the corner. I think he may have sung later on. I am not sure about that.

Q. You don't know whether you heard him or not?

A. No. I was positive of the identification. It was not necessary to depend on my ear.

Q. What was the basis of your being positive at that point of your identification?

A. Because I had, with the exception of the short blind distance, I had followed him into the lavatory, allowing him time to reach the lavatory, and when he left the lavatory I saw him and gave him time to reach the vicinity of the janitors' closet again, and the same man appeared.

Q. Where is this janitors' closet located with reference to the lavatory?

A. It is located between the top of point "E" at the top of the sketch, and between there and the lavatory. [116]

Q. Is it north or south of the lavatory?

A. I would say that it would be southeast of the lavatory.

Q. Of the lavatory? A. Of the lavatory; yes.

Q. What direction does the door of the lavatory face?

A. I believe that the lavatory would face the east.

Q. Face the east. Now, did you see, after he went to the janitors' closet, what he got out of it, or did you see him get anything out of it?

A. Yes; he got his broom out of it.

Q. He got his working tools? A. Yes.

(Testimony of Alfred E. French)

Q. And among which was a push broom, was it, or did you see what the tools were?

A. I didn't pay much attention, to tell you the truth, just what he did get, except that they were both handling cleaners' tools in there.

Q. You didn't pay much attention to the tools that were in the hand? A. That is right.

Q. And you went there particularly for the purpose of watching him, didn't you? A. Yes.

Q. And yet you made no notice what was in his hands [117] at that time?

A. I was not interested in what was in his hands at that time. I was only waiting until he got here to the area where the package was to see what he would do with it.

Q. You were particularly interested in seeing the package in his hands, is that right?

A. The package was there and if he wanted to take it, that was up to him.

Q. It was put there for the purpose?

A. Any one could have picked it up.

Q. What was the purpose of the package being put there?

A. We had had a number of losses in the area, and having heard quite a bit about the reputation of this man—

Mr. Townsend: Just a minute. I move to strike that, if the court please.

Mr. Fitting: If the court please, he asked for it.

The Court: Motion denied. You asked him his reasons. Now, he may talk all afternoon on his reasons.

Mr. Townsend: Proceed.

(Testimony of Alfred E. French)

The Court: Unless you wish to withdraw the question.

A. Our men had been watching Kelley for sometime, and under very suspicious circumstances, and told me that they suspected him. And we had found packages disappearing from these areas on the third floor after Mr. Kelley had [118] worked in there and—

Q. By Mr. Townsend: Now, explain exactly what were those circumstances upon which—

The Court: Have you finished your answer?

The Witness: No, sir.

Mr. Townsend: Proceed.

The Court: Finish your answer.

A. We also heard of a case where Kelley had swept a package of butter up into his trash hamper out in the back of the Terminal Annex, as witnessed by Mr. Turner, a railroad employee, who has given a sworn statement to that effect. We had heard a number of those instances and for that reason, naturally, we were wondering if he might not have something to do with these packages that were disappearing.

Q. By Mr. Townsend: Now, having heard of all of these things—

The Witness: Pardon me. I am not through yet.

Mr. Townsend: Proceed by all means.

A. We have statements from several building guards who have seen Kelley leave the building from various public entrances at different times, which was directly contrary to the instructions to employees. They are supposed to enter the building and leave the building through the employees' entrances. And Kelley carried packages with him, and it looked like if those were legitimate pack-

(Testimony of Alfred E. French)

ages and belonged [119] to him, that he would have used the employees' entrances and exits. He did not carry them in to the building; that is, he was never seen carrying those packages in, but he carried packages out.

And we had another report of a man who came to the door of the janitors'—what we call swing room or recreation room in the basement of the building and saw Kelley standing in front of another man's locker, and it appeared to this man that, since Kelley was not in front of his own locker and there was no one else in there, that Kelley was probably trying different lockers to see which ones were unlocked and he could get into. I think that is all.

Q. Have you finished? A. Yes.

Q. You searched Mr. Kelley, didn't you?

A. I did not search—yes; I did.

Q. What did you find that belonged to the Government? A. Nothing.

Q. You also searched his locker, didn't you?

A. I did find something. Do you want everything I found?

Q. Everything that is in evidence.

A. You don't want all the things that were found in his pockets?

Q. You searched him at this time of this transaction [120] here, didn't you? A. Yes.

Q. You also searched his locker immediately following, didn't you? A. Yes.

Q. You also went to his home and searched his house, didn't you? A. No.

(Testimony of Alfred E. French)

Q. You had some representative to do it, didn't you? Did you not instruct someone who did search his house?

A. I don't know. That would be drawing a conclusion if I said that, because I don't know what happened.

Q. Did you instruct anyone to go search his house?

A. No.

Q. Did you know of anyone who did search his house?

A. No.

Q. Since the day of his arrest? A. No.

Q. Do you have any report as to it having been searched and having found nothing?

A. I asked a couple of our men to go out and see his girl friend, that is, a person reputed to be his girl friend and see if—

Q. Was that his house? A. Her house. [121]

Q. No. His house is what we asked you.

A. Well, they did go to his house to see if his wife—

Q. They did go to his house?

A. To indicate whether he had brought any of this stuff home.

Q. Did they demand any access there at his home?

A. They didn't search the place.

Q. His wife welcomed the men, did she not? You got that report, didn't you?

A. Well, I understand the people were very courteous. I don't know whether they were welcomed in or not.

Q. In fact, they were unusually courteous, leading them through the house, were they not?

A. I don't know about that.

Q. And they came back with empty hands, is that correct? A. Well, I didn't see them.

(Testimony of Alfred E. French)

Q. Have you seen anything that they brought back here from Mr. Kelley's house? A. No.

Q. Out of all these fancy rumors and reports that you got, have you at any time ever—

Mr. Fitting: If the court please, I think the question is argumentative.

The Court: He has not completed his question, Mr. Fitting. Complete your question. [122]

Q. By Mr. Townsend: I say, in the light of all these detailed reports that you got, placing Mr. Kelley under suspicion, have you at any time ever—and I think he has been there seven years, hasn't he? A. Yes.

Q. Has he at any time during that seven-year period, has he ever been found wrongfully possessing Government property. to your personal knowledge?

A. I have never found it.

Q. That is the question. Have you found any?

A. That is a different question. I haven't been there very long.

Q. How long have you been there?

A. Since about last August.

Q. Have you seen him with any Government property since last August, since you have been there?

A. I didn't know Kelley.

The Court: Have you seen him since last August possessing Government property? Is that the question?

Mr. Townsend: That is the question.

The Court: Prior to this occasion?

The Witness: No, sir.

(Testimony of Alfred E. French)

Q. By Mr. Townsend: When did you hear all these rumors and reports that you mentioned?

A. At various times preceding the 21st of December, [123] at various dates.

Q. I see. Now, do you mail butter through the mail?

A. During the butter scarcity there was a considerable amount going through the mail.

Q. By the way, who did you say prepared these two packages, Exhibits 2, 3 and 4?

A. Postal office inspector Shore and my secretary, Mr. Surdam, and myself.

Q. I am sorry. Proceed. I didn't mean to interrupt you.

A. And myself.

Q. What contents, if anything, were placed in them at the time they were prepared?

A. Well, there was a pair of socks placed in one of them and one or two handkerchiefs placed in the other.

Q. And who addressed them?

A. Mr. Surdam addressed this Exhibit 3 and Mr. Shore addressed Exhibit 2.

Q. I see. Which is Exhibit 3? That went to Mrs. Johnson?

A. This is that wrapper.

Q. Now, who addressed that one?

A. Mr. Surdam, my secretary.

Q. And the one addressed to Mrs. A. S. Cluff, who addressed that one? [124]

A. That was addressed by Mr. Surdam.

Q. And they were prepared in the office?

A. Yes, sir.

(Testimony of Alfred E. French)

Q. What was the purpose of their being prepared?

A. Well, the purpose was to try to determine who was stealing these parcels on the third floor of the Terminal Annex.

Q. The purpose was to determine who was steading parcels?
A. Yes.

The Court: Mr. Townsend, you may be under a misapprehension that the witness has answered as to who addressed Exhibit 2, but I do not believe he has.

Q. By Mr. Townsend: Which is the paper? 3 and 4 are together. Which is 3, the paper or the box?

A. The one on the top.

Q. I think the paper with the address on is 3. I believe the question is who addressed that paper that was around 4.
A. Yes. That was Surdam.

Q. No. 4 was wrapped in with Exhibit 3, wasn't it?

A. Yes.

The Court: The answer is: Mr. Surdam addressed that one.

Mr. Townsend: Mr. Surdam. [125]

The Court: Who addressed Exhibit 2?

The Witness: Mr. Shore.

Q. By Mr. Townsend: Mr. Shore?

A. Yes, sir.

Q. And back of the purpose of their being prepared was to determine who was stealing parcels, is that right?

The Court: Your answer?

The Witness: Yes.

Q. By Mr. Townsend: Was that the sole purpose?

A. Yes; it was.

Q. No other purpose whatsoever but that, is that right?
A. That is correct.

(Testimony of Alfred E. French)

Q. You had no intention, then, of mailing them for the purpose of actually sending them anywhere at all?

A. They were mailed. They were duly mailed and addressed and the return address—rather, the addressees are living people, and if they had gone through they would have been given to those people.

Q. But they were mailed and they were addressed with no purpose of reaching the addressee at all, were they; it was only to determine who was stealing parcels?

A. Well. I would not say that. There would have been a purpose in them reaching the addressees if they were not taken before that. The purpose would have been for them to [126] reach the addressees. That was the prime purpose, to see if they would reach the addressees.

Q. Your testimony was that that was the only purpose, was to find out who was stealing parcels, is that right?

A. Well, I am sorry, but when you begin to get technical on it, then I have to tell you that there was a purpose for these articles to reach the addressees.

Q. Were there return addresses on them?

A. Yes.

Q. Who were the supposed senders?

A. Do you want their names?

Q. Please. A. C. S. Heaven.

Q. C. S. who? A. Heaven, H-e-a-v-e-n.

Q. Who is C. S. Heaven? Is he a real person or a fictitious person? A. He is a real person.

Q. Who is the addressee on there? Call that name, if you will. A. Mrs. E. Johnson.

Q. Is she a real person or a fictitious person?

A. A real person.

(Testimony of Alfred E. French)

Q. Was she a personal acquaintance, the addressee of that package, or know anything about the transaction? [127]

A. She was an acquaintance of one of the group. not of myself.

Q. Whose acquaintance was she?

A. I think she was probably an acquaintance indirectly of possibly Inspector Shore.

Q. An acquaintance, not directly, possibly, of Inspector Shore. Do you know or did you not know who she was acquainted with?

A. I didn't personally know, except that she was known to the extent that it was known to be a good living person and a good address.

Q. And someone just decided to send her some Christmas presents, is that right?

A. Well, whatever you would call it.

Q. You were there and we were not. Just tell us what happened, who was going to send her some Christmas presents. Whose friend was she that intended to get her some Christmas present? This is Christmas season, Christmas mail.

A. They were being sent by the persons whose names I have already given you.

Q. Was the contents of the package purchased as a Christmas present for somebody?

A. That is correct; partially out of my money.

Q. Who purchased them?

A. Inspector Shore and myself. [128]

Q. With your money? A. Yes.

(Testimony of Alfred E. French)

O. And you bought a Christmas present for someone whom you admittedly do not know?

A. That is correct.

Q. Now, you followed the trail of the gentleman who was sweeping south, is that right? A. Yes.

Q. Do you know what the method is in the accumulation of trash when janitors are sweeping, that is, whether they pick it up at intervals or whether they carry the pile until it accumulates at the end of the aisle section where they are sweeping?

A. Well, that is something that would not be constant. Different people would handle that in different ways.

Q. What happened in this case?

A. In this case it was swept all the way up the aisle, some 50 or 55 feet, and then around the corner into this area here, before any effort was made to obtain a hamper to put it in.

Q. And the pile, of course, accumulated and got larger as it went along, is that right?

A. It very likely did; yes.

Q. Well, you are looking at it. It did, didn't it?

A. Surely. [129]

Q. He also emptied one or two trash baskets on that pile, is that right?

A. Well, two at that one point and more as he went along.

Q. You saw him pick up two, is that correct?

A. I saw him pick up two at that particular point "A".

(Testimony of Alfred E. French)

Q. You were at point "E" all the time, is that right?

A. Yes. And I mean he picked up two baskets in the Pico Heights area.

Q. In the area of point "A" he picked up two baskets?
A. Yes.

Q. Now, did you have any particular suspicion when he picked up the two baskets and threw them onto the pile, that is, did you think he was going to steal the baskets?

A. Well, you ask for my suspicion. I knew he was possibly doing it in order to cover up the package.

Q. You suspicioned him all the time. didn't you?

A. Surely, after he had thrown the box in his trash there. I couldn't do otherwise.

Q. And you had all of these previous reports, didn't you?
A. That is right.

Q. So that anything he would pick up and turn around and throw into the pile, the natural presumption was that he was stealing, isn't it? [130]

The Court: You are asking if that is the witness' natural presumption?

Mr. Townsend: Yes.

A. That is my presumption; yes.

Q. So you presumed that he intended to steal both of the trash baskets. He did the same thing to them that he did with the package, didn't he, and turned around and threw them into the pile?

A. That is right; he secreted it.

Q. Well, why did you presume he wanted to secrete the package and not the trash baskets?

A. He didn't throw any baskets in. He just threw the contents of the baskets in there.

(Testimony of Alfred E. French)

Q. Then, you never at all saw the package at point "B", did you? A. That is in—which one is that?

Q. The southwest corner area of the building, of the floor.

A. No; I didn't see that package after it was placed in there at all.

Q. You do not know what happened to it or how it was moved, do you? A. No.

Q. You saw a gentleman with his back to you, bent?

A. No; his back was not to me. I explained that his [131] back was—well, he was facing me.

Q. Facing you? A. That is right.

Q. And still his face to you, you saw no package at point "B", is that right?

A. At that distance I could not see what he was doing in there.

Q. Well, you had come to the point "I" for the same purpose, of looking to see what was going on, hadn't you?

A. To see as much as I could see.

Q. And your stoppage there, I think you testified, so he could not see you, was for the purpose of watching him? A. That is right.

Q. You were watching him with his face to you, is that correct? A. That is right.

Q. And you saw no package of Exhibit 3 and 4 in his hands?

The Court: Your answer?

A. I could not see what he had in his hands.

Q. By Mr. Townsend: The answer is yes or no, sir. Did you or did you not see the package.

The Court: He said he could not see.

Mr. Townsend: Thank you.

(Testimony of Alfred E. French)

Q. Now, when did you first call Mr.—I think you said [132] you picked up a telephone and called Mr. Franzen in from point “E”. Is there a telephone up there?

A. Yes. We have a portable telephone that can be plugged in any place in the gallery.

Q. Where was the defendant—you were following this course, now—where was this defendant when you first called Mr. Franzen on the telephone?

A. He was in the Station “E” area at a point just west of “H”, the letter “H”.

Q. He was not here?

A. No. Down—where was he or where was I?

Q. The question was: Where was the defendant when you called Mr. Franzen?

A. Yes. He was down there in Station “E”.

Q. Oh, down at Station “E”?

A. That is right.

Q. How high are these diagrams here? What allowance is indicated by the diagram from the floor?

A. They are about seven feet to the top.

Q. Seven feet to the top? A. Yes.

Q. What was the approximate height of the man you saw, this little fat man?

A. Well, he had been described as being short. He looked to me like— [133]

Q. You were looking at him, weren't you?

A. Well, I could not see down there in Station “E” area what was going on.

Q. You saw him all the way from point “E” down, didn't you?

A. Well, until he turned into the Station “E” area.

(Testimony of Alfred E. French)

Q. He was working, of course, with his back to you all the time, wasn't he, going south, and you were standing there? A. That is right.

Q. You saw him. What would you approximate the height of the man that you were looking at?

A. Well, that distance it would be pretty hard to approximate anyone's height. He looked to be an average height to me.

Q. You saw him up close, didn't you?

A. I did when he started, but I thought you were talking about when he got down there to point "H".

Q. How tall would you estimate he was at point "E"?

The Court: You mean when the witness was at point "E"?

Mr. Townsend: When the defendant was at point "E"—when the man, rather, was at point "E" that you saw sweeping with his back to you; how tall did that man seem to you to be?

A. Well, he looked pretty short. I would say around five-four.

Q. Five-four. Did he seem to grow any taller or shorter as he worked south? [134] A. No.

Q. So he appeared to be five-four all the way down the aisle, is that right?

A. Well, the farther away an image gets, as you well know. the more indistinct becomes the height and other parts that can be seen from a distance.

The Court: We will take the afternoon recess at this time of five minutes.

(Short recess.)

The Court: Is it stipulated, gentlemen, that the defendant is present?

(Testimony of Alfred E. French.)

Mr. Townsend: The defendant is present, your Honor.

Mr. Fitting: So stipulated.

The Court: Proceed.

Q. By Mr. Townsend: Mr. French, you have seen the various janitors sweeping daily from around the post office building, haven't you?

A. I have noticed them.

Q. You see them every day. I mean just in the ordinary course of things?

A. No; I don't see them every day.

Q. Well, you see them with some regularity, sweeping, the janitors at work? I am trying to get at—

A. No; I do not see them with any regularity. I see them occasionally. [135]

Q. You have seen them occasionally and you have seen them use these various brooms. You know the type of brooms they use; that is a push broom, isn't it? Isn't that what they use? A. Yes.

Q. In sweeping, you have perhaps seen when you get to anything that is bulky, it doesn't sweep smoothly with these type of brooms, does it? That is, the brooms of the type they make is for lighter types of trash, is that right?

A. Well, I don't know that we have any heavy type of trash on the post office floor.

Q. If it is anything like this bulky, say, a piece of paper rolled up the size of your fist, it would not pick it up; you would have to pick it up with your hands, wouldn't you?

A. That is right. May I add to that? You would not have to pick it up unless you intended to do something

(Testimony of Alfred E. French)

with it. You could push a piece of paper with one of those brooms easily enough. But I mean, if you are going to put it some place to preserve it, you would naturally pick it up.

Q. And if it is too heavy and too bulky to sweep, and you wanted to throw it out, the proper place to put it would be in a trash pile where the trash goes, wouldn't it?

A. If you were going to throw it out, you would; yes.

Q. How many feet—a few minutes ago there was a [136] pointer here. How many feet is it from point "E", approximately, down to the point "B"?

A. It would be approximately 55 or 60 feet.

Q. Or 60 feet? A. Yes, sir.

Q. How far is the ceiling from the floor on this floor?

A. The what?

Q. The floor to the ceiling; how high is it? How many feet?

A. Well, I really wouldn't have much of an idea how high it is.

Q. Just estimate. A. Approximately 22 feet.

Q. 22 feet. And how high is it from the bottom part of this lookout on the inside to the top part of it? How tall is it inside for a man standing up?

A. Well, a tall man could walk in there. I presume it would probably be about eight feet.

Q. About eight feet tall?

A. Maybe seven feet.

Q. And I think you said it is approximately 10 feet from the bottom up to that point from the floor?

A. I could have been a little off there. It might be a little higher, possibly 14 feet from the floor.

(Testimony of Alfred E. French)

Q. The bottom of it would be approximately 14 feet from [137] the floor? A. That is right.

Q. Now, I think you also testified that these racks that are indicated here at Pico Heights and Wilshire and the others down to point "B" are about seven feet tall from the floor, is that right? A. Yes, sir.

Q. Consequently, standing, as you were, at point "E", 14 feet from the floor and looking 60 feet south over a seven-foot wall, you could not see a five-foot four-inch man at all?

A. I did not look 60 feet. I beg your pardon. You asked me how far it was from "E" to point "B", which is different than from "H" to "E". Which do you mean, now?

Q. Point "B".

A. Yes; and I told you that was perhaps 55 to 60 feet.

Q. And the wall there is seven feet high from the floor? A. Surely.

Q. Is that correct? A. That is right.

Q. And you were 60 feet to the north?

A. No; I would not say I was 60 feet to the north.

Q. How far would you say you were?

A. About 50 feet. [138]

Q. 50 feet to the north and 14 feet high, is that right?

A. Yes.

Q. Now, you followed the defendant's course as he reached point "H" and then turned, sweeping into this area where "D" is? A. Yes, sir.

Q. Is that correct?

A. I followed him to where he turned; yes.

Q. You followed him to where he turned. Of course, he was approximately the same size in your observation

(Testimony of Alfred E. French)

up to this point "H" when he turned as he was at that point "E"? A. I think I told you that.

Q. Approximately the same—

A. That the distance or the height of a man would be a little more difficult that far away to determine. All that I was able to note was that it was the same man. I followed the same man all along there and the man that was up there under point "E" was about, I judge, five feet-four.

Q. As a matter of fact, this man after reaching point "H" completely disappeared from your view, didn't he?

A. He did.

Q. And you saw him no more until you reached around point "I", is that right?

A. That is right—well, I did see him again in [139] between there. I saw him, as I explained a little while ago, when he came out to go down after his trash hamper.

Q. About how long was that from the time you observed him from point "E" in terms of minutes?

A. Between what two points exactly do you mean?

Q. Between point "E" and then, later, at point "I". I think it was carried to point "I" that you saw him going after his hamper, isn't that right?

A. No. I observed him going after his hamper while I was still up in the lookout.

Q. To point "E"? A. That is right.

Q. I see. Did he have any of his work tools in his hands at that time, or did you observe?

A. I noticed he didn't have any work tools at the time he was going after his hamper.

Q. Just going empty handed? A. Yes.

(Testimony of Alfred E. French)

Q. Nothing in his hands at all?

A. I didn't observe anything.

Q. You did not see the packages 3, 2, or 4 then?

A. No.

Q. Now, how long after you had seen him go after the hamper before you came out of the lookout, down and around to point "I"? [140]

A. Well, that probably would have been when he came back to Station "E" with his hamper. I would say probably it was about four or five minutes before I went down on the floor.

Q. Did you see him when he came back with the hamper?

A. Yes. That is what I mean, when I saw him going back with the hamper, about four or five minutes there.

Q. How long was he from the time he went after the hamper until the time he came back?

A. A very, very short time.

Q. He came immediately back with it?

A. He came immediately back with it; yes, sir.

Q. Did you notice where the trash pile was at that time?

A. He had swept the trash pile clear behind those cases there so that I could not see.

Q. That is the whole accumulated sweepings?

A. The whole thing.

Q. Had piled up down here at about point "B", about, is that right?

A. Some place in that area. I don't know whether it was point "B" or right in point "H" there. I could not observe it.

(Testimony of Alfred E. French)

Q. It was around the corner from point "H" to where you were, is that right? [141]

A. It was around the corner; yes.

Q. Then after he came back with the hamper, I think you said about five minutes later, you left point "E" and came downstairs, is that right? A. Yes.

Q. How did you come out of the lookout? What was your point of exit?

A. My point of exit, my route of exit was the same as my route of entrance, back to the inspectors' office.

Q. That is back to "L"? A. Yes.

Q. You completely circled all the way around to "L"?

A. That is right. And then I went around to the second floor, through the south corridor there on the second floor and then turned north and went up the employees' stairway opening up into the cafeteria.

Q. Where was that with regard to the indication on the map here? Was that east, west, east or what?

A. That would be—

Q. You went out here?

A. I came out past the front elevators there, came south here to the corridor, this being on the second floor.

Q. On the second floor.

A. Turned right, going north there and into the private stairs that comes up. [142]

Q. Up to the third floor?

A. Up to the third floor and around the tie section. You saw that there when you use to work there, I think, Mr. Townsend.

(Testimony of Alfred E. French)

Q. The stairway here is under point "G". That is the stairway down, approximately under point "G", is that right, or a little to the west of point "G"?

A. Where is the point "G"?

Q. Right here. I think you said the stairway was along about in here some where on the second floor; is that about right?

A. I think that is about where it would run on the second floor.

Q. And then ascend that stairway to the third floor?

A. Yes, sir.

Q. Where did this stairway lead into the third floor? Does it come up at point "G"?

A. Well, it comes up near the tie section there.

Q. Near the which section? I am sorry.

A. I guess that would be up—that would be farther up there. I had forgotten that that is only a portion of the floor there. They would have come up probably off of this diagram here north of all of this area. Here is where I made my entrance onto the third floor. just north.

Q. Where did you reach the bottom of the stairway, is [143] the first thing I am trying to get; and where did you reach the top? Where were you when you were at the bottom of the stairway?

A. I am sorry, I told you I was thinking that sketch was of the whole floor there.

Q. The second floors are practically the same in general pattern as the third, aren't they?

A. I don't know too much about that building, to tell you the truth. I haven't done an awful lot of work in that building.

(Testimony of Alfred E. French)

Q. You have an office there?

A. I have an office there.

Q. And you are there every day?

A. Yes; but I don't go down on the working floor very much.

Q. How long have you been there in the building?

A. Probably about six months.

Q. Six months?

A. Yes. But, as a matter of fact, they—

Q. You have been out on this floor?

A. You asked a question where those stairs would come up. I think they would be just a little ways north of that upper limit of the diagram there.

Q. We are just trying to find out where you came out. You have already testified you entered the stairway at a [144] point—

A. You know that building better than I do.

Q. That is right. A. You used to work there.

Q. Surely.

A. If I tell you the stairway back there that the employees used and the cafeteria are the stairs that I used to come up you will know.

Q. Assume that this point "G" is a point on the second floor; where would the stairway be?

A. It would be a considerable distance beyond the upper limit of the diagram.

Q. Will you indicate, then, your course from the time you exited from the lookout at "L" and how you got to the stairway, if it is different from what you previously testified? Just give us now the present course.

A. I followed the same course from here down. This curved on the second floor, where I turned right and came

(Testimony of Alfred E. French)

to the point where those stairs go up from the second and third floor, which, on second thought, I remember are outside the limits of that diagram.

Q. That is the stairway? A. That is right.

Q. And where would you estimate the point of beginning of that stairway on the second floor north of the diagram? [145] Would it be under the lavatory?

A. I really don't know. I have never gone through that building with a fine-tooth comb.

Q. Would it be under the janitors' closet?

A. I can't tell you that.

Q. As a matter of fact, you don't know where you went upstairs, do you?

A. The stairs, I tell you, were north of the diagram, and the janitors' closet—well, the janitors' closet would be called the upper edge of the diagram outside of the stairs and some distance.

Q. As a matter of fact you have no clear recollection which way you went?

A. I beg pardon. You know where the stairways are.

Q. The judge doesn't know.

A. I told you I came up the stairway there. You know where they are.

Q. I know, but the judge does not. He wants to know.

A. I think he understands as well as you do.

The Court. Proceed, gentlemen. Put your next question.

Q. By Mr. Townsend: When you came out at the top of the stairway on floor three, when you knew and

(Testimony of Alfred E. French)

recognized you were on floor three—you have gone up the stairs now—where were you on floor three?

A. I was near the elevator shaft where the stairway [146] comes up there above the cafeteria, toward the mid portion of the building looking at it from south to north.

Q. Does the stairway come directly up or does it cross the building as it ascends?

A. It comes directly up.

Q. Directly up? A. Yes.

Q. So you were at a point, approximately, on the third floor when you got to the top, very close to the same general point when you were on the second floor, is that right? A. Yes, sir.

Q. So you would be approximately in the upper northeast corner on the second floor?

A. I wouldn't say that. It is a long ways from the stairs down to the northwest corner of the building. That is on the west side of the building.

Q. Do you have lookouts on the second floor?

A. Yes; there is a lookout there.

Q. Are they of the same pattern? I mean in the—

A. I can't tell you, because I haven't been all the way through it.

Q. All right. But, from that point—you are on the third floor now—how did you get from that point after you got upstairs around to point "I"? You are now at the top of the stairway. Will you follow your course from the top of [147] the stairway to point "I"?

A. I turned, or, rather, I went almost directly east across the building and I reached the point that I have laid out with a dotted line there. I think I did that some-

(Testimony of Alfred E. French)

time ago, didn't I, and showed you my route over the parts shown in the diagram.

Q. I mean off the diagram from the stairway to the point on the diagram. I am trying to get your course. Did you go directly from the stairway point on the diagram?

A. I went across the building approximately from west to east, and then turned right and traveled south onto the diagram.

Q. Now, with all of this round about way—I mean about how long do you think it took you to do all that?

A. Oh, probably three minutes.

Q. You say you are not too familiar with the route as you were going, were you?

A. Oh, I am very familiar with the route.

Q. You were not feeling your way as you went long?

A. No.

Q. Did not get lost at any time? A. No.

Q. At any time losing your location?

A. I know the third floor there fairly well. I am not too conversant with the second floor. [148]

Q. How much time would you estimate, the number of minutes, from the time you left point "E" until you finally landed up at point "I"?

A. Probably around three minutes. I was in quite a hurry to get down there.

Q. Three minutes. Now, I think you testified when you got to point "I" you saw the defendant bending over his hamper, is that right? A. That is right.

Q. I think you testified that he bent over there for approximately one and a half minutes; is that your testimony? A. That I was there?

(Testimony of Alfred E. French)

Q. That the defendant bent over his hamper for approximately one minute?

A. I think I testified that I watched him for about half a minute. but he was still bending over at the time I left.

Q. How long from the time you then turned until you got back there with Mr. French and Mr. Kinny, I believe you testified?

A. It probably would have been about five minutes, five or six minutes.

Q. Now, what was the hour when you left point "E" on the lookout? A. Approximately 5:45. [149]

Q. And what was the hour when you reached point "I"?

A. Well, I did not carry a stop watch with me. I would only estimate it took me about three minutes there, in which case I should have arrived there about 5:48.

Q. Did you have a watch on your person at the time, a wrist watch?

A. I did—not a wrist watch; no.

Q. Did you make an observation of the time?

A. No; I didn't at that time.

Q. How long was it before you came back with Mr. French and Mr. Kinny?

A. Mr. French and Mr. Kinny?

Q. Mr. Franzen—pardon me—and Mr. Kinny after you had seen him bending over the hamper, now, and when you came back with Mr. Kinny and Mr. Franzen, is that right?

A. Yes. It would have been approximately five minutes.

(Testimony of Alfred E. French)

Q. At the time you saw the defendant bending over the hamper did you observe a pile of trash?

A. No.

Q. That is, there was no trash at that time on the floor? A. That is right; there was not.

Q. That is, it had all be picked up and thrown into the hamper?

A. I didn't observe any. There might have been a little [150] behind a pillar or something.

Q. You had observed previously a pile that he had accumulated?

A. I tried to explain several times that I could not see what went on from point "E" after he went up and turned the corner.

Q. As the sweeping went on down from point "E" all the way to "H" you saw the pile that did accumulate?

A. That is right; yes, sir.

Q. And when you got around to "I" you saw no pile on the floor, is that right? A. That is right.

Q. But the hamper was there with some of the contents in it, is that right?

A. Well, I couldn't see from point "I" what was in the hamper.

Q. Was anything at all in there?

A. I couldn't see from point "I".

Q. Is that the same hamper that you brought back a few minutes later and dumped? A. Yes.

Q. The same hamper that you saw him bending over into was the same one that you later dumped, is that right?

A. I am reasonably sure that it was; yes.

(Testimony of Alfred E. French)

Q. Can you tell the difference, Mr. French, in the [151] sound of a hamper when it is emptied or when it is full rolling across the floor?

A. No; I have never thought of that point.

Q. You saw him when he went and got it and brought it to this point, I think you testified, didn't you?

A. Yes.

Q. In listening to it, you could not form any opinion or you did not form any opinion at that time as to whether it was empty or whether it had contents in it?

A. Well, yes; my opinion was that it was empty.

Q. It was empty. And at the time when you returned, you found it in fact full, is that right?

A. Well. about two-thirds full.

Q. About two-thirds full. The two packages that you found in the basket were, I think you testified, down near the bottom just mixed up in the trash near the bottom of the hamper, is that right?

A. Well, they were pretty far down. I would say they were approximately in the middle of the pile, although we did not take a ruler out and measure it.

Q. But you did not locate it until you actually turned it up and dumped the whole thing out, before you finally got the packages?

A. That is right. And then we had to pull a lot of trash away and dig down into it to find them. [152]

Q. And after having found the packages in this sack of trash, you then inquired of the defendant as to the identity of them and so forth, is that correct?

A. What do you mean by "identity"?

Q. I have to quote your words. You then immediately said to the defendant: "What did you do with that

(Testimony of Alfred E. French)

package?" or something in substance to that effect. Were those your words? A. Yes.

Q. And I think you said further, in fact, to use your own expression, "you insisted that he did know something about it," is that right? A. Yes.

Q. And he equally as energetically denied any knowledge of it apart from any other trash?

A. That is right.

Q. Is that correct? A. That is correct.

Q. Where do the janitors take the hampers when they get them filled up? A. I really don't know.

Q. Where do the janitors take the hampers when they get the mfilled up? A. I really don't know.

Q. What do you do with your trash? [153]

A. Well, I don't do anything with the trash.

Mr. Fitting: If the court please, he said he does not know.

Q. By Mr. Townsend: You don't know what they do with the trash? A. Not in detail; no.

Q. You are a postal inspector, aren't you?

A. I know that the trash eventually arrives in the basement, but just what route it takes to get there I would not be able to tell you.

Q. What are your functions as postal inspector? What do you inspect?

A. Well, we do not inspect trash as a general rule. We inspect offices and the accounts.

Q. You inspect where the custodial labor would carry their trash, don't you? A. No.

(Testimony of Alfred E. French)

Q. You don't?

A. Well, we know the general disposition of the trash, but we do not look into the minutest detail of exactly how it is handled.

Q. You are a postal inspector and do not even know where the trash is supposed to go.

The Court: Is that a question?

Mr. Townsend: That is a question. [154]

A. I know that trash goes to the basement.

Q. All right. A. And it is sorted through.

Q. Do you know what is supposed to be done with it after they get it into the basement?

A. It is supposed to be sorted through.

Q. And who does the sorting through?

A. The custodial employee who is assigned to the duty.

Q. And is that a regular floor assignment?

A. I would not be able to tell you that. That is not a part of our function.

Q. If one would miss-sort it or something, that would be your function, wouldn't it?

A. Not unless it was brought to our attention.

Q. Have you ever been down in the incinerator room in that building?

A. The other day I was down in the room where they sort through the trash. But—

Q. Was that your first experience?

A. It was.—I don't know where they took it from.

Q. Never down there before? A. No.

Q. What did you find when you got down there?

A. I found—

The Court: Do you mean the other day? [155]

(Testimony of Alfred E. French)

Mr. Townsend: Yes. When you got down to this sorting room.

A. I found several hampers setting around there that had trash in them, evidently, and found a screen there where they run the hamper up on an elevated platform and dump it and sort the trash through this screen and pull out any mail that might have inadvertently gotten in.

Q. Did you see any hampers being emptied there at the time you were there? A. No; I didn't.

Q. The hampers that you did see, were they empty?

A. No; they were not all empty. There were some with contents in them.

Q. Was the contents trash? A. Yes.

Q. Was there in this sorting room an accumulated pile of trash there?

A. I don't remember of seeing any accumulation of trash right there at the time. As a matter of fact, I don't know how that trash is disposed of here, whether it is carried away or whether it is incinerated right there.

Q. Did you observe a gentleman there doing the sorting? A. Yes.

Q. What was he sorting?

A. Well, I would like to correct that. He was not [156] actually working at the time I was there. I was down there to question him on a matter and, as a matter of fact, he was not doing any sorting right at that time.

Q. But you observed the equipment with which he does sort when he is sorting, is that right?

A. Well, I couldn't say that I observed all of it. I observed a part of it, that which I have described to you.

(Testimony of Alfred E. French)

Q. Have you ever as a postal inspector been informed as to the purpose of all this that you saw down there?

A. Well, the purpose of it is to get rid of the trash. Of course, before it is disposed of, to look through it and extract any pieces of mail that might have been inadvertently mixed up in it.

Q. Isn't it a fact, Mr. French, that the specific purpose of this assignment is to screen mail that might be lost in the trash?

A. That is correct.

Q. That is quite regularly done, isn't it?

A. Yes.

Q. And particularly so in the Christmas season or any other rush season, isn't it?

A. Well, I would not say particularly so. It is always done.

Q. Isn't it heavier in the Christmas season than any other time of the year? [157]

A. It is heavier; yes.

Q. You would have some several million pieces of mail.

A. They are no more particular with it at Christmas than they are any other time. They are always supposed to be careful with that sort of matter.

Q. Do you not have to have added personnel to sort and handle mail during the Christmas season?

A. Yes. But I don't know that they have any extra help for that:

Q. Didn't they have during the past Christmas season some five or six thousand extra employees just for the Christmas season?

A. I don't know how many they have. They have a large increase.

(Testimony of Alfred E. French)

Q. A large increase, representative increase?

A. Well, they have an increase every Christmas.

Q. And they put them off after the Christmas season, don't they? A. They do what?

Q. They release them, they discharge them after Christmas day?

A. Not all of them. There are some of them discharged.

Q. When did this increase begin?

A. Well, it probably began early in the month. That is up to the postmaster. [158]

Q. It starts around 10 days before Christmas, doesn't it? A. That is when the peak begins.

Q. Around the 15th of December?

A. They put on extra people a number of days before that.

Q. So the fact of the case is that the mail load tremendously increases during those 10 days, is that right?

A. That is well known; yes.

Q. I beg pardon?

A. I say that is a well known fact; yes.

Q. And the probability of mail getting either inadvertently mishandled or lost becomes greater at that particular season, doesn't it?

A. In the aggregate; yes.

Q. And at that particular time of year a man is down there sorting this trash full-time, isn't he?

A. I don't know what his hours are. I am sorry.

(Testimony of Alfred E. French)

Q. What time of the day or night was it when you were down there?

A. I was down there around 1:00 o'clock, as I remember it. No; it was a little later than that. It was about 3:00 o'clock one afternoon.

Q. In the morning or afternoon?

A. In the afternoon. [159]

Q. 3:00 o'clock in the afternoon. Did you observe how many were working in that particular location?

A. There was only one man there at the time. As a matter of fact, he was not working.

Q. How close is this— A. What is that?

Q. What is the proximity of this sorting room to the incinerator where the trash is burned?

A. I couldn't tell you. I did not go down there to inspect the incinerator and don't know whether there is an incinerator there or not.

Q. If, perchance, one of the custodial laborers would wrongly burn a piece of mail would that come within your jurisdiction, in the incinerator?

A. Well, if they did it accidentally, it very likely would not be brought to our attention. In other words, the postmaster has certain things to do, and he does not or is not employed to run up to us with every little thing that happens in the office that is a matter of routine.

Q. And if they burn it accidentally or on purpose, it comes to your attention, doesn't it?

A. Not every little thing; no.

Q. Isn't that your specific function?

A. That is a function, if there is any value lost and it can be shown that it probably occurred down there. [160]
In other words, if we have some mail that comes to our

(Testimony of Alfred E. French)

attention that does not reach the addressee, we generally don't run down to the incinerator to ask the man down there whether he might have burned it in the incinerator.

Q. Suppose that you have some suspicion that a man was burning some of it, would you then have your jurisdiction to go down there? A. Yes.

Mr. Fitting: If the court please, I object to that question. It calls for a conclusion of the witness and it is on a subject that is completely immaterial and irrelevant.

The Court: He has already answered it. Objection overruled. The answer may stand.

Q. By Mr. Townsend: I think your answer was yes; that would come within your jurisdiction, is that right?

The Witness: Will you repeat your question?

The Court: The answer is in the record.

Mr. Townsend: The answer is in the record. All right.

Q. Where is your office located in this building as an inspector?

A. On the second floor, room 202, right in front of the elevators on the south side of the building facing the Union Station.

Q. And is it located as to have direct access to the working floors, that is, to the— [161]

A. No; it is not contiguous with the working floors. We have to walk a little distance to get on the working floors.

The Court: Are you about finished, Mr. Townsend?

Mr. Townsend: Yes. Just one more question, your Honor, and I am about through with this witness, I think.

(Testimony of Alfred E. French)

Q. At no time did you see either of these packages, either 2, 3, or 4 in the defendant's personal possession?

A. Yes; I saw it in his possession when he picked that package off the sack rack.

Q. When he picked it up, I thought you said he turned his body with his back to you, is that right?

A. No. No; quite the contrary. His back was turned to me when he picked it up.

Q. And he turned his face to you?

A. And he swiveled around, facing me, and then went on around to a point where I was facing the trash pile.

Q. He at that time was at point "A", is that right?

A. Will you point out point "A"?

Q. Pico Station? A. That is right.

Q. When he was at point "A" where was the trash pile?

A. The trash pile was just to the right. Don't we have a letter there, an "F"?

Q. Does "F" represent the trash pile?

A. Yes. [162]

Q. Approximately what is the distance in feet between "A" and "F"? A. As a matter of fact, that—

The Court: What is the approximate distance between "A" and "F", Mr. French? I think we have had that twice, but let us have it again.

The Witness: Pardon me, your Honor. I just want to explain that "A" is in a little too far. But the distance, to answer your question, would have been probably about three feet.

Q. By Mr. Townsend: And he picked that up from the sack rack floor there and threw it some three or four feet directly into the trash pile? A. Yes.

(Testimony of Alfred E. French)

Q. And after that, I think you testified he took his broom and proceeded to sweep the entire area, is that right; is that your testimony?

A. Well, after he had dumped a couple of pails or buckets of wastepaper in it and then got some sweeping compound, why, then he proceeded to sweep.

Q. That was the sequence that immediately followed the throwing of this package into the trash?

A. That is right. Well, immediately following, he pushed some racks up together. He first pushed the racks up compactly after throwing the package, and then dumped the [163] wastebaskets and the sweeping compound.

Q. Was that the proper function of what he did or was supposed to do? That was proper?

A. Those were his duties, except for the picking up of the package.

Mr. Townsend: That is all.

Mr. Fitting: I would just like to ask two or three questions.

The Court: Please limit it to that, will you?

Mr. Fitting: All right, your Honor.

Redirect Examination

By Mr. Fitting:

Q. Mr. French, in your direct examination you referred to an individual as Mr. Kelley and described what Mr. Kelley did. When you referred to Mr. Kelley did you mean that individual sitting over there?

A. Yes, sir.

Q. You also said that these slits in that observation gallery were about a half inch wide? A. Yes.

Q. Did they in any way hamper your vision? Could you see perfectly through them?

A. I could see perfectly; yes.

(Testimony of Alfred E. French)

Q. You also testified that you saw Mr. Kelley bending [164] over his trash hamper in the general area of "B"?

A. Yes, sir.

Q. Could you see his hands when he was bending over the trash hamper?

A. I saw the tops of his hands, and he was moving them around somewhat, but I couldn't see just what he was doing.

Mr. Fitting: That is all.

Recross Examination

By Mr. Townsend:

Q. When he moved his hands around did he appear to be packing trash into that hamper? A. No.

Q. Where you were standing up at point "E" what was the condition of light in that whole area?

A. As I remember it, he had the lights out at that particular time in that particular section.

Q. The lights were out. Was that when you were at point "E"?

A. No. That was when I was at point "I".

Q. What were the conditions of the lights when you were at point "E"? A. The lights were on.

Mr. Fitting: If the court please, I believe Mr. Townsend has been over that. [165]

The Court: He has answered. Are you going to be much longer, gentlemen? I want to arrange for a night session if you are going to be much longer.

Mr. Townsend: I have finished, your Honor, with him.

Mr. Fitting: No further.

The Court: You may step down, Mr. French.

Mr. Fitting: Mr. Kinny.

ROY KINNY,

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your name, sir?

The Witness: Roy Kinny.

Mr. Townsend: I think perhaps, if the court please, we can save some time if we can ask on voir dire what the people purport to prove by this witness, by all the witnesses not at the scene of any of the transactions.

The Court: If you tell us that there might be a possibility of a stipulation.

Mr. Townsend: I do not know what he is supposed to prove by him.

Mr. Fitting: Mr. Kinny is simply going to prove what the scope of Mr. Kelley's duties were.

The Court: Offer a stipulation and perhaps Mr. Townsend will join in that stipulation. [166]

Mr. Fitting: Mr. Kinny will testify that all the custodial laborers, including Mr. Kelley, were instructed that they were not to touch mail at any of the places where mail was customarily put or kept. He will also testify that if they found any mail or packages on the floor, or any places where mail did not belong, they were to pick it up and put it on any of the tables or racks that were around there; and that if they found any money, they were to put it in a specific place that was maintained in which money should be put.

The Court: Does that cover your offer?

Mr. Fitting: And he will testify that Mr. Kelley was so informed at the time he was employed there.

The Court: So instructed?

Mr. Fitting: So instructed.

The Court: Do you accept the stipulation?

(Testimony of Roy Kinny)

Mr. Townsend: With this particular addition, which we will bring out on cross examination, that his particular duties were to sweep all areas, including the cleaning of the sack racks; that the instructions with regard to the handling of mail was contingent upon his knowledge that it was mail. With that addition, we will be happy to stipulate.

Mr. Fitting: That is agreeable, your Honor.

The Court: Very well. As I understand, you both stipulate to the effect that this witness will be deemed to have been sworn and to have testified as upon direct examination [167] as Mr. Fitting has stated and upon cross examination as Mr. Townsend has stated?

Mr. Townsend: So stipulated, your Honor.

Mr. Fitting: Now, Mr. Kinny—

The Court: Do you so stipulate, Mr. Fitting?

Mr. Fitting: Yes, your Honor.

The Court: Very well.

Mr. Fitting: Mr. Kinny will also testify that Mr. Kelley is the only gentleman on the custodial force as small as he is. None of the other members of the force were on duty that day of his size.

Mr. Townsend: Just a moment. That is part of the testimony that I think would be objectionable, because it would certainly be a conclusion of the witness to which he could not testify.

The Court: Had you finished your offer?

Mr. Fitting: Mr. Kinny will testify that he was the supervisor of the custodial laborers and on that morning he assigned the custodial laborers to their various duties on the third floor; and he assigned Mr. Kelley to sweep the particular area concerning which all this discussion

(Testimony of Roy Kinny)

has been had; and that Mr. Kelley was the only small member of the custodial force he assigned to work in that area that day.

The Court: Do you stipulate that this witness will be deemed to have testified as to the assignment as stated by Mr. Fitting? [168]

Mr. Townsend: As to the assignment.

The Court: But not as to the height of the defendant?

Mr. Townsend: As to the height, we certainly object to that as a conclusion.

The Court: Otherwise?

Mr. Townsend: Otherwise the stipulation is that he would so testify.

The Court: Very well. Ask him the questions that you wish about the height of the defendant.

Direct Examination

By Mr. Fitting:

Q. Mr. Kinny, are you acquainted with the defendant, Mr. Kelley? A. I am.

Q. Did you assign him to work on the morning of December 21st?

Mr. Townsend: That has been stipulated to.

The Court: That is covered by the stipulation. Objection sustained.

Q. By Mr. Fitting: What height would you judge the defendant to be?

A. Oh, five-three to five-two, along there.

Q. Were there any other custodial laborers that small?

A. None of that physical build. [169]

Mr. Townsend: Just a moment. I object to that as being a conclusion of the witness.

(Testimony of Roy Kinny)

The Court: Sustained.

Q. By Mr. Fitting: Mr. Kinny, what would you estimate to be the height of the next smallest custodial laborer that was at work on that morning?

Mr. Townsend: I object to that question on the same ground.

The Court: Sustained.

Mr. Fitting: Well, your Honor—

The Court: Sustained.

Q. By Mr. Fitting: Were there any other custodial laborers of Mr. Kelley's height?

Mr. Townsend: The same objection, if the court please, the same grounds. It is the same question with different phraseology.

The Court: Sustained. No foundation laid, no showing that this witness examined all these workmen.

Q. By Mr. Fitting: Mr. Kinny, did you see all the custodial laborers that you assigned to work on the third floor on the morning of December 21st? A. Yes.

Q. Did you look at them all? A. Yes.

Q. Are you familiar with their heights? [170]

A. Yes.

Q. Were any of them as small as Mr. Kelley?

A. No.

Mr. Townsend: I object to that, if the court please. It is still calling for a conclusion of the witness. He has not shown he has made any measurements of anybody's height.

The Court: Overruled. The answer may stand.

Mr. Fitting: That is all, your Honor.

Mr. Townsend: That is all.

The Court: You may step down Mr. Kinny.

Mr. Fitting: If the court please, the Government would now like to offer into evidence Exhibits 1, 2, 3 and 4.

The Court: Exhibits 1, 2, 3 and 4 for identification are received into evidence.

Mr. Fitting: That is the Government's case, your Honor.

The Court: Are you offering Exhibits 5 and 6?

Mr. Fitting: No, your Honor.

The Court: The photographs?

Mr. Fitting: No, your Honor.

The Court: Very well. Does the Government rest?

Mr. Fitting: Yes; it does.

The Court: The defendant.

Mr. Townsend: If the court please, we should like to be heard at this time on a motion to dismiss the indictment, if we may. [171]

The Court: A motion for a judgment of acquittal?

Mr. Townsend: A motion for a judgment of acquittal; that is correct.

The Court: On what ground?

Mr. Townsend: Two grounds. One is that the defendant is charged under the indictment to have violated U. S. Code Title 18, Section 318, which reads as follows:

"The postmaster or employee detaining, destroying or embezzling mail matter."

That is the subject of the section.

"Whoever, being a postmaster or other person employed in any department of the Postal Service, shall unlawfully detain, delay, or open any letter, postal card, package, bag or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, * * *"

I think, substantively, all the evidence which has been categorically admitted for the Government is to the effect that there was no intention at any time whatsoever that Exhibits 2, 3, and 4 were ever destined with any intention for official mailing. They were drawn and prepared for a specific purpose and place, not in the care of the mails, but placed at a given place where the custodial workers were known to come along, placed there at the time before he came along, approximately a very few minutes before he approached, [172] as certainly having knowledge that he was coming or would have knowledge in the ordinary course that he would come, and placed in a place where they know he was going to sweep among that trash in the course of his assignment, eventually accumulating the various things that had been swept up in the cleaning. After they had laid there for a specific number of minutes Mr. Franzen was sent back by instructions to see if it was still there, and to follow out his various instructions.

There is no evidence at all anywhere that certain procedures you use in the course of the mail, which I am certain is utterly in the acquaintance of this gentleman who is a postal inspector, and he knows, I think, or should know that the formalities of the postal service is not to put any package into the hands of another, some foreman or superintendent or custodian of the building, and tell him to place that down on the floor somewhere, some 15 inches from the floor, and watch it for a certain number of minutes.

The Court: Must I not take Mr. Kinny's testimony by the stipulation that this defendant was instructed not to pick up mail matter off the floor?

Mr. Townsend: That is correct, your Honor; mail matter which he knew to be mail matter is the stipulation.

There is not one scintilla of evidence anywhere constituting the essence of any crime. You certainly must have the act and the state of mind of that defendant. There has been not one scintilla [173] of evidence under this section.

Where is there any intention on the part of the defendant, having any knowledge of the identity of what it was?

The lights were low. It was 4:00 or 5:00 o'clock in the morning. The conditions of lighting were dim, according to all the witnesses. And then, coming along this course of sweeping, with the type of broom he had, any bulky substance, as the gentleman testified, the broom would not pick it up and naturally, the defendant would pick it up and throw it into the trash pile.

The Court: But, on this motion, I must accept the testimony as given. Take Exhibit 2, it is obviously a Christmas package.

Mr. Townsend: But it is now shown, if the court please, that the defendant ever saw the address on it, whether it was setting upside down or what.

The Court: Upon this motion, not having heard the defendant's case, I must take Mr. French's testimony with respect to that.

Mr. Townsend: Mr. French did not testify that the defendant had knowledge of the identity of the package as to what it was. He testified as to Mr. Franzen's knowledge. He at no time testified as to the defendant's knowledge. How could he have testified to it?

The Court: But under Mr. Kinny's instructions, he [174] violated the instructions in picking up this article off of the truck or wherever it was—it was not on the floor—and throwing it into the trash pile. He could not pick it up very well without seeing these postage stamps on it.

Mr. Townsend: If he picked it up and immediately turned around and threw it into the trash, without giving it any examination observation—the testimony was that it was immediate—he picked it up, turned around and threw it. It was a continuous motion. He took no time to look and see, nor was he charged with any duty to look and see. It was not incumbent upon him, according to instructions, to go and search and find out which is mail and which is not. That is what a man is put down in the incinerator room to do, to sort and determine which is mail and which is not.

The Court: Under his instructions, according to Mr. Kinny's testimony, he should have left that parcel, Exhibit 2, where it was, should he not?

Mr. Townsend: I think the stipulation carries the conclusion he was also instructed to clean all the area, including the sack rack, floors, everything else. That also was part of the stipulation. It certainly was part of his duty to pick up any trash that was there, without taking any particular cognizance of it. No trash was there, according to the testimony. It was an empty set of racks. No reason to presume that mail was there. It was early in the morning [175] and the place was dark. And if there is any presumption in which the court is to indulge it must be a presumption, this being a criminal proceeding, that he did not know. I do not think the court would indulge any presumption that he did know, and there is no evidence at all that he did.

The Court: Have you finished your motion?

Mr. Townsend: I have finished my motion, your Honor.

The Court: The motion is denied.

Mr. Townsend: Take the stand, Mr. Kelley.

DEFENSE

WILLIAM GATHER KELLEY,

the defendant herein, called as a witness in his own behalf,
being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: William G. Kelley.

Direct Examination

By Mr. Townsend:

Q. Where do you live, Mr. Kelley?

A. 1353 West 36th Place.

Q. How long have you lived there?

A. 25 years.

Q. Who do you live there with? [176]

A. My wife.

Q. Do you own the property where you live?

A. I do.

Q. Prior to the date of your arrest where were you
employed? A. United States Post Office.

Q. How long had you been in their employ?

A. Approximately seven years.

Q. Prior to the time of your arrest had you ever had
any trouble or difficulty in connection with your employ-
ment? A. No.

Q. Speak louder so we can hear you and the court can
hear you.

Have you prior to this time had any trouble in connec-
tion with your employment? A. No.

Q. I still can't hear you, myself.

A. I said, "no."

Q. All right. Calling your attention to the 21st day
of December, Mr. Kelley, you worked on that night, did
you? A. I worked on that morning.

(Testimony of William Gather Kelley)

Q. What is your work schedule?

A. Janitor work.

Q. What hours? A. 5:00 o'clock. [177]

Q. Punch in at 5:00 o'clock? A. That is right.

Q. What time did you punch out?

A. Punched out at 5:30.

Q. Who is your foreman? A. Mr. Kinny.

Q. Where do you receive your assignments?

A. Down in the basement.

Q. Did you meet and receive your assignment that morning? A. Yes, sir.

Q. Is there any incinerator room down in that basement where you met? A. There are.

Q. Anywhere close to where you met to get your assignment? A. No.

Q. Just a sorting room down there? A. Yes.

Q. Where you put trash before you burn it?

A. Yes.

Q. Do you know whether or not a man is kept there by full time assignment in that assorting room?

A. They are.

Q. Is that one of the custodial workers? [178]

A. He is not classed as a custodian. He is classed as a postal mail handler.

Q. A postal mail handler? A. That is right.

Q. Is there one there continuously during the routine working hours? A. Every day.

Q. Do you know the purpose of his being there? What is the general function, I mean?

A. Looking for mail that is lost in the tubs.

(Testimony of William Gather Kelley)

Q. Where were you assigned to work on the morning of December 21st?

A. On the third floor on the west end of the building.

Q. What did your assignment take in, in terms of area?

A. It takes in three aisles, approximately about 60 feet and 150 feet deep—I mean 250 feet. The building is 250 feet wide and I have three sections there, which is about 20 feet to the section or 22, something like that.

Q. Had you worked that same section before?

A. Many times.

Q. I mean are you assigned to the same section each day or different assignments each day?

A. No. That was my first assignment when I went into the building to work. I worked for about three years or more, then they changed me, and I hadn't been on that assignment for over a year and a half or more, because I had been out on [179] the R. C.

Q. How long has Mr. Kinny been your foreman?

A. Ever since I have been there.

Q. The entire time. Do you know what time that you got up to the area of your assignment that morning, approximately?

A. We punched in at three minutes to 5:00, and I was on the third floor approximately five or six minutes past 5:00.

Q. Where did you keep your tools to work with?

A. I keep my tools down in the basement. I went by my tub where I keep my tools and carried my tools up with me.

(Testimony of William Gather Kelley)

Q. You say your "tub." You mean your trash tub or a laundry tub?

A. No. I have a box down there with rollers on it and I keep my tools in it.

Q. Anyone else have their tools in with your tools?

A. Not supposed to.

Q. You are assigned the tools as well as duties, is that right?

A. That is right.

Q. Are you assigned a certain hamper?

A. No. You pick up any hamper as long as it is an old one. They don't allow us to put rubbish or trash in one of the new tubs. [180]

Q. Where do you put your trash?

A. Elevators 9 and 10 and carry it down.

Q. Before you carry it down there what do you put in the hamper?

A. Put the trash in the hamper; yes.

Q. What are your instructions with regard to disposing of the hamper after you fill it up?

A. To take it down.

Q. Where do you take it to?

A. Down to the basement.

Q. Where in the basement?

A. Down into the southeast corner.

Q. What room is this where you take it?

A. In the basement.

Q. I mean do you take it directly to the incinerator, or do you take it first to the sorting room?

A. No; you don't carry it to the incinerator at all. You carry it to the assorting room.

Q. Is that your specific instruction?

A. That is right.

(Testimony of William Gather Kelley)

Q. Always take it to the sorting room, never to the incinerator, is that right? A. That is right.

Q. Has that been your continuous instruction all the time you have been there? [181]

A. All the time I have been there.

Q. Calling your attention to the course of your work, where did you start sweeping that morning?

A. I started sweeping in the northwest corner of the building.

Q. Which direction did you sweep?

A. Swept south.

Q. In sweeping the trash do you sweep all around the aisle, or do you sweep out immediately under those racks?

A. The way the building is laid out, we start in the northwest corner and sweep it out to the center aisle. Then we go into the middle section and sweep it out to the center aisle. And then we come back and sweep it right on down to where we pick up our trash.

Q. Did you sweep under the racks?

A. Swept all over.

The Court: Did you sweep under the racks?

The Witness: Yes, sir.

Q. By Mr. Townsend: Do the racks stand flat on the floor or do they have legs of any sort?

A. The racks stand on little dollies, some of them, about four or five inches high from the floor.

Q. That is the sack racks. Some of the sack racks have wooden floors on them down on rollers, is that right?

A. The rack itself sets on the rollers. [182]

Q. Do they have a different person there to clean the floors and to clean the racks? A. No.

(Testimony of William Gather Kelley)

Q. The same custodial laborer cleans everything in that area, is that right? A. That is right.

Q. Do you use a hand broom?

A. You could use a push broom. I have a straight broom; yes.

Q. A little short handle, something about that long, about a foot long?

A. Oh, it is longer than that. I have a straight broom but I couldn't use it on pushing trash.

Q. Do you generally have one?

A. I generally keep one all the time.

Q. What do you do with that broom?

A. That is to get in cracks where I can't get in with my push broom, just wherever that comes convenient for me to work with.

Q. That is, you do not sweep the floor with it?

A. No.

Q. You sweep the floor with a push broom, is that right? A. That is right.

Q. In the little places, corners and cracks, you use a hand broom?

A. Use the hand broom where I can't get my push brush. [183]

Q. Is that correct? A. That is right.

Q. Would that type of broom that you sweep the floor with push anything that is bulky, that is, of any size? I mean, sweeping the floor on something that is of any size, will the broom pick that up?

A. It won't pick it up, but you can shove it along on the floor.

(Testimony of William Gather Kelley)

Q. How did you generally do it if you got some bulky trash?

A. We just reached down with our hands and pick it up.

Q. In sweeping how did you accumulate your trash? Did you do it in individual piles, or did you go all the way accumulating a big pile?

A. Depends on how heavy the trash is on the floor.

Q. How did you do yourself?

A. Well, that particular morning I swept mine all the way across the building.

Q. Did you at any time pay any notice or take any notice to any mail of any kind that you observed to be mail?

A. No; because I didn't see any packages on the truck, because when I was sweeping we shove the trucks around to make room to get around so we can clean. A package could have been laying on the truck and had been shaken off by pushing the trucks around. [184]

Q. What are the conditions of light under which you work over in that area?

A. The light sets from about eight to six feet apart in that particular area. There is about three run abreast. There is about 12, about 12 or 14 lights to the section.

Q. Those lights are controlled by switches at the station at various intervals, are they not?

A. The lights are controlled by a switch on a post.

Q. Do you have any instructions with regard to the use of lights while you are cleaning up?

A. That is the first thing I do when I get to it in the morning, is turn on the lights.

(Testimony of William Gather Kelley)

Q. Do you turn on the lights in the whole area of your assignment, or the area merely where you are cleaning?

A. Light up the whole A building. That is what they call the A building, that end of the building. I light up the whole A building.

Q. Where do you finally end up with your trash pile?

A. I ended up on the southwest corner.

Q. And where did you have your hamper parked in the meantime?

A. I carried my hamper along with me until I picked up the trash. When I came back over in the center section I brought my hamper over in the center section and then I went back around in the southwest corner to pick up my broom and [185] come back and started to sweeping out that corner. By that time Kinny came up to me and asked me how I was getting along. I told him I was getting along all right. Then he came back about five minutes later and asked me how I was doing. I told him I was just about through. Where did he want me to go then, because I started—

Q. Just a minute. When did you first see Mr. Kinny, I mean after down in the basement?

A. About 5:20.

Q. That was shortly after you had gone onto the assignment that Mr. Kinny came up?

A. That is right.

Q. Was this before Mr. French and Mr. Franzen came up there? A. That is right.

Q. Approximately how long before Mr. Franzen and Mr. French came up there did you see Mr. Kinny?

A. Mr. Kinny had left me—oh, about five or 10 minutes, when Mr. French came up and called me. He

(Testimony of William Gather Kelley)

called me and said, "Kelley"? I said, "Yes." He says, "Come here."

Q. Who called you, now? A. Mr. French.

Q. Wait just a minute. Let us follow Mr. Kinny now. A. All right. [186]

Q. You saw Mr. Kinny about how many minutes there before Mr. French came up?

A. About five or 10 minutes.

Q. About five or 10 minutes. Approximately where were you working when you first saw Mr. Kinny up on that floor?

A. When I first saw him I was up at the janitor closet. That is when he first came around and asked me how I was getting along.

Q. Were you talking to him before you actually started sweeping?

A. I was sweeping practically that section then when he came back and talked to me.

Q. Were you talking to anybody before you started to work? A. I talked to a fellow in the toilet.

Q. Who was he? A. I don't know who he was.

Q. One of the fellows that worked there?

A. I imagine he worked there. I had never seen the man before.

Q. Down in the southwest corner, near the end of that particular Pico section of the building, did you at any time notice any particular package that you took to be mail or that you knew was mail or that looked to you particularly like mail? [187]

A. No; because I wasn't looking for any packages.

(Testimony of William Gather Kelley)

Q. Did you make any cleaning of these intervening racks that I think are about seven feet tall there? Do you know what those things are?

A. Yes; those are racks about two feet wide and about five or six feet long and about 18 to 30 inches high from the ground. And that particular rack I saw was piled up with packages, magazines and papers.

Q. Did you bother with any of those things?

A. I shoved it around to one side. Some mail fell off and I left it laying there.

Q. You did not throw any mail that you saw and knew to be mail in the trash pile? A. No.

Q. Did you at any time pay any particular attention as to the identity of any part of your trash before this hamper was turned upside down to empty it?

A. No; I never paid any attention to the trash until Mr. French and Kinny and Whitey—we always call the superintendent over there “Whitey” because all we knew him by was “Whitey”.

Q. You at no time took any notice of any part of what your trash consisted of?

A. No; not for mail I didn't.

Q. What did you do, just pick it up and throw it in the [188] hamper?

A. That is right; just picked it up and threw it in the hamper.

Q. What did you pick it up in?

A. Pick it up in the dust pan. At that particular time the dust pan was up at the other end. I just picked it up with my hands. The paper was heavy.

(Testimony of William Gather Kelley)

Q. When you put this trash in your hamper did you pack it down, tramp it down to get it all in?

A. If the trash is heavy enough, we do. But that morning the trash wasn't heavy enough so there was no reason for packing it down.

Q. Oh, this dust pan, where was it?

A. About middle ways of the building.

Q. It was not in your hamper at all? A. No.

Q. Therefore, at this particular time you took all the trash up with your hands?

A. Picked up all the biggest trash; yes.

Q. Did you in the course of picking it up take any particular notice of what it was other than just trash?

A. No; I wasn't paying any attention, for I was not looking for any mail.

Q. Did you notice any address on it to anybody?

A. No.

Q. Did you know Mr. French before that morning?
[189] A. I never had seen him before.

Q. Have you ever been called into the office at any time during the seven years about their losing or mis-handling of the mail or anything else that was mail?

A. No.

Q. I mean trash that was mail? A. No.

Q. Have you ever been called in for putting mail in your trash hamper before? A. No.

Q. Has any of the trash that you have ever taken down to the sorting room, so far as you know, ever been screened to find any mail in it?

A. That I can't say.

Q. I mean before this time that you know of?

(Testimony of William Gather Kelley)

A. I couldn't say.

Q. It has never been called to your attention?

A. That I couldn't say.

Q. What did Mr. French say when he came up there?

A. When he came over in the section where I was he called me. He says, "Kelley?" I says, "Yes." He says, "Come here." I walked over to him and he says, "What did you do with those two packages that you picked up a while ago?" I says, "I never picked up any packages." He said, "Oh, yes; you did." He said, "Myself and Mr. So and So [190] saw you." He called "Whitey" by his name. He said "Whitey laid down the packages there for the purpose of your picking them up." I said, "I didn't pick up any packages." And by that time Kinny and Whitey came along together. Kinny came along there and said, "What the hell is the matter?" I says, "I don't know. He claims I picked up some mail here. I didn't do it." And by that time Whitey goes over in the center and gets my tub and brings it over there and turned the tub upside down and we all looked through the trash. I helped them to look through the trash, and we found those two packages in there. And he said—Mr. French says, "Here is a wrapper for one of the packages." And that is all I know about it.

Q. That was the first time that you knew or identified any particular part of what that trash was?

A. That is right.

Q. I think you said Mr. French told you when he came up there that these packages were put there for the purpose of your getting them or something to that effect?

A. That is right.

Mr. Townsend: You may cross examine.

(Testimony of William Gather Kelley)

Cross Examination

By Mr. Fitting:

Q. Mr. Kelley, on this particular morning did you [191] sweep off any sack racks in Pico Heights Station area? A. I swept the whole section.

Q. Did you sweep off the floor of any of the sack racks?

A. That is my instructions, to sweep off the bottom of the racks at all times and dust them off.

Q. Did you on that morning sweep off any of them in that area?

A. Yes; I swept that whole entire section.

Q. Would you please answer the question?

The Court: Did you sweep the floor of the platform of the sack racks?

The Witness: Yes.

Q. By Mr. Fitting: You swept the floor of the sack rack in the Pico Heights area on that morning?

A. Yes; I swept all the racks that had floors on them.

Q. Mr. Kelley, you also testified that when you were down in this Section E area you pushed around a full table that was laded with mail and things and some fell off? A. I just pushed a corner of it around; yes.

Q. And some packages fell off?

A. I don't know how much fell off. Some of the mail fell off of it; yes.

Q. You did not pick them up? A. No. [192]

Q. You just left it on the floor? A. Sure.

Q. You also testified, I believe, Mr. Kelley, that you never put a package in your hamper before?

A. That I never put one in my hamper before?

(Testimony of William Gather Kelley)

Q. Yes.

A. Sure; I never put no package in my hamper.

Q. No one ever complained to you about putting a package in your hamper before? A. No.

Q. No one ever found one in there and called it to your attention? A. Not up there, they didn't.

Q. At any time while you were employed by the Post Office Department?

A. Oh, there has been packages put in my tub and said I put them in, but I didn't put them in there.

Q. But packages have been found in your tub before?

A. One morning a package was found in my tub. I called Mr. Kinny's attention to it and told him I didn't do it.

Q. That is the only occasion you can remember?

A. That is right.

Q. Do you remember what the package was?

A. No. [193]

Q. Do you remember when that was?

A. No; I do not.

Q. But you called Mr. Kinny's attention to it?

A. Yes. If anything goes wrong I call his attention to it. That is my place to call his attention to it.

Mr. Fitting: That is all, your Honor.

Mr. Townsend: That is all.

The Court: You may step down.

Mr. Townsend: Defendant rests.

Mr. Fitting: I have a witness on rebuttal, your Honor.

The Court: Very well.

GEORGE J. TURNER,

called as a witness by plaintiff in rebuttal, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: George J. Turner.

Direct Examination

By Mr. Fitting:

Q. By whom are you employed, Mr. Turner?

A. By the Los Angeles Union Passenger Terminal.

Q. In what capacity?

A. I am a U. S. Mail separator.

Q. Where do you work? [194]

A. At the Terminal Annex on the R. C., known as the "Railroad Contact floor."

Q. Have you ever seen the defendant, Mr. Kelley, before? A. I have.

Q. Did you see him sometime last summer sweeping?

A. Yes, sir.

Q. Will you tell the court what happened on that occasion?

Mr. Townsend: Just a moment. I object to that. What happened last summer, that has no connection with this case, if the court please.

The Court: Overruled. You may answer.

A. May I in my own words, your Honor? One time last summer we were getting quite a number of shipments of butter. There was a shortage of butter and—

Mr. Townsend: Just a moment, just a moment. If the court please, may we request that he specify both time and place before he proceeds?

The Court: About when was that, Mr. Turner?

(Testimony of George J. Turner)

The Witness: I would say sometime in June or July, one of those months.

Q. By Mr. Fitting: 1946? A. 1946.

The Court: Very well. [195]

A. And in my course of my work that morning I placed a package of about three and one-half or four pounds, anywhere between three and five pounds of butter, postmarked "Puente, California," over next to the wall.

Q. By Mr. Fitting: How big a package was that?

A. I imagine the package was about a foot square—a foot long and, say, about nine inches high.

Q. Had stamps on it? A. Yes, sir.

Q. An address on it? A. Yes, sir.

Q. Tied up with a string? A. Yes, sir.

Q. Go ahead.

A. And it was postmarked to Puente, California.

Mr. Townsend: Just a moment, just a moment. There is no question before the witness.

Q. By Mr. Fitting: Then what happened?

A. Well, we didn't have a dispatch for that particular point at that time of the morning; so I placed the butter over next to the wall. Mr. Kelley was sweeping. He was the janitor on that floor at that time. Mr. Kelley swept this butter—I watched Mr. Kelley sweeping—start at the north wall and swept toward the south wall, and in his course of sweeping—there are three chutes that come out [196] where the post office throw the mail out of the post office down so that we can dispatch it to others. Mr. Kelley swept this butter under the chute down as the "S. P. chute." I saw him do it. I waited until he took his hamper, rolled the basket under the chute, rolled the hamper under the chute, and after he did that I went over to

(Testimony of George J. Turner)

look to see if he had put the butter back and he hadn't put the butter back. I found the butter in his hamper. I reported it to my immediate superior, Mr. L. W. Phigpen, and he took the butter out of the hamper and cautioned Mr. Kelley not to put anything in the hamper with stamps on it.

Q. Do you know who Mr. Kinny is?

A. Yes; I know Mr. Kinny.

Q. Was Mr. Kinny there at that time?

A. No; Mr. Kinny was not there.

Mr. Fitting: That is all, your Honor.

Cross Examination

By Mr. Townsend:

Q. Now, Mr.—what is the name, again, sir?

A. Turner.

Q. How do you spell that? A. T-u-r-n-e-r.

Q. Mr. Turner, what type of package was this butter in? [197]

A. It was wrapped in a brown package, nearly like a paper sack. It was a brown paper sack.

Q. What was the approximate size of it?

A. I would say it would be about a foot long and about from six to nine inches high.

Q. Approximately how much did it weight?

A. Somewhere between three and five pounds.

Q. How much butter was in there?

A. I don't know. I didn't open the package.

Q. How do you know it was butter at all?

A. Because it was marked "butter—perishable."

Q. Marked "butter"? A. Yes, sir.

(Testimony of George J. Turner)

Q. Have you ever seen any other packages or boxes with "butter" printed on it that had other things in it?

A. I never found any in the mail.

Q. How long have you been working in the post office?

A. October the 2nd, 1942.

Q. Have you ever seen a cake mailed in a ginger ale box?

A. Marked "cake"? Not in a ginger ale box.

Q. Have you ever seen anything in a box that was labeled something else?

A. No.

Q. Where did you first get the package? [198]

A. I got the package out of the rack known as the "state and town rack".

Q. What was the occasion of your first getting it out of the rack?

A. Well, that is my duty when the mail comes in off of the train, if it is transferrable to different trains, then to separate it for that train.

Q. Is it your duty to find out what is in each package on the inside?

A. No, sir.

Q. Did you open the package?

A. No, sir.

Q. Was there any way you could see from handling the inside of it?

A. The only thing was that the sack was greasy and it was printed on there plainly "butter".

Q. That is the only deduction that you drew, that butter was the thing in there?

A. Yes, sir.

Q. Did you ever see any Christmas packages get through with butter in them?

A. Yes, sir.

Q. Did you ever see meats of various sorts shipped through the mail?

A. Sure. [199]

(Testimony of George J. Turner)

Q. Was that greasy?

A. Sometimes meats are greasy, sometimes they are not.

Q. All of them have these meat signs on them that they were meat?

A. No; they don't necessarily have meat signs on them. They sometimes have "perishable foods—rush" and "special delivery."

Q. Did you have a conversation with Mr. Kelley at this time before he had reached this package that you said had the butter in it?

A. You mean before he swept the butter under the chute?

Q. I asked you did you have any conversation with Mr. Kelley before the time this box that you say butter was in was touched? A. Yes, sir.

Q. You talked with him before that time?

A. Sure.

Q. Where were you talking with him?

A. Down at the north end of the building.

Q. Did you see him sweeping toward the butter?

A. Yes, sir.

Q. You did not say: "Look out, Kelley, that is butter there, or to look out, don't sweep that," or anything that would cause him to be warned not to touch [200] the package? A. No, sir.

The Court: Did you say that?

The Witness: No, sir.

(Testimony of George J. Turner)

Q. By Mr. Townsend: You just stood there and looked at him, is that right?

A. There wasn't anything I could do.

Q. Looked at him from the time he started sweeping all the way through as you describe and didn't say a word?

A. No.

Mr. Townsend: That is all.

Q. By Mr. Fitting: Mr. Turner, why didn't you say anything to Mr. Kelley?

A. Well, you see, it has been a practice that I didn't know. I didn't say anything to Mr. Kelley about the butter. I went and got the foreman and the foreman took the butter out, which was my duty to do. You see, if things are—well, anything that goes wrong you are supposed to report it, any accidents, to your immediate superior, and then he goes on from there.

Mr. Fitting: That is all.

Q. By Mr. Townsend: You report accidents as well as intentional affairs, is that right?

A. That is right.

Q. So, as to this situation you don't know whether [201] is was an accident or on purpose, do you?

A. I couldn't very well swear it was.

Q. You don't know, do you? A. No.

Mr. Fitting: That is all. If the court please, I would like to put Mr. French on and just ask him two questions.

The Court: Very well.

ALFRED E. FRENCH,

recalled as a witness by plaintiff in rebuttal, being previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Fitting:

Q. Mr. French, when you were in the observation place marked "E" watching Mr. Kelley at work in the Pico Heights Station marked "A" did you see him sweep off any of the package racks?

A. No, sir; he didn't sweep any of the package racks off at all.

Q. Now, Mr. French, when you came down into the area marked "B"—

Mr. Townsend: Just a moment, just a moment. I would like to get that answer clear. You say that you did not see [202] him? A. I say he did not.

Mr. Townsend: Proceed.

Q. By Mr. Fitting: Did you see Mr. Kelley the entire time that he was in this general area?

A. I did; yes, sir.

Q. All the time that he cleaned it up and then moved on to the next area? A. Yes, sir.

Q. Now, Mr. French, when you accosted Mr. Kelley in the area marked "B" in Station E, with Mr. Franzen, were there any packages of mail of any sort on the floor there? A. No, sir.

Q. You are sure of that? A. I am sure of that.

Mr. Fitting: All right.

The Court: Any questions, Mr. Townsend?

Mr. Townsend: I think that is all, your Honor.

The Court: Have you any questions?

Mr. Townsend: No questions.

The Court: You may step down. Do both sides rest?

Mr. Townsend: The defendant rests.

Mr. Fitting: Yes, your Honor.

The Court: Any argument? I do not care to hear from the Government. Do you have anything to say, Mr. [203] Townsend?

Mr. Townsend: I do, if your Honor please.

(Argument by Mr. Townsend omitted from transcript.)

The Court: Mr. Townsend, if defendant had taken only one package, one of the decoys, there might be some room to say that there is reasonable doubt. But under all the circumstances and the fact that both decoys placed in different places under different circumstances were found in his tray, under the circumstances here, leave no doubt in my mind.

The court finds the defendant guilty as charged in the first count of the indictment and finds the defendant guilty as charged in Count Two of the indictment.

I will refer the case to the probation officer for presentence investigation and report, and fix February 10th at 1:30 as the time for the hearing of that report and for sentence.

In the meantime the defendant is remanded to the custody of the marshal and his bond exonerated.

Anything more, Mr. Clerk?

The Clerk: That is all, your Honor.

Mr. Townsend: If the court please, would it be possible that the defendant remain on the present bail until the date of the hearing on the probationary report?

The Court; No, Mr. Townsend. The defendant will be [204] remanded to the custody of the marshal and his bail exonerated.

[Endorsed]: Filed Jun. 18, 1947. [205]

[Endorsed]: No. 11557. United States Circuit Court of Appeals for the Ninth Circuit. William Gather Kelley, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed June 23, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

At a Stated Term, to wit: The October Term A. D. 1946, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City of Los Angeles, in the State of California, on Friday the twenty-first days of March in the year of our Lord one thousand nine hundred and forty-seven.

Present:

Honorable William Denman, Circuit Judge, Presiding,
Honorable Albert Lee Stephens, Circuit Judge,
Honorable Homer T. Bone, Circuit Judge.

No. 11557

WILLIAM GATHER KELLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ORDER GRANTING MOTION FOR ADMISSION
TO BAIL PENDING APPEAL

Upon consideration of the motion of appellant, filed March 7, 1947, for admission to bail pending appeal, and of the opposition of appellee thereto, filed March 17, 1947, and oral presentation of said motion,

It Is Ordered that said motion be, and hereby is granted, and that appellant be, and he hereby is admitted

to bail upon the filing with the clerk of the District Court of the United States for the Southern District of California of a bail bond in amount of Two Thousand Five Hundred Dollars (\$2,500.00) conditioned as required by law, the bond to be approved by the United States Attorney for said District.

CERTIFIED COPY OF ORDER GRANTING
MOTION FOR ADMISSION TO BAIL
PENDING APPEAL

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled cause.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of Los Angeles, in the State of California, this 21st day of March, 1947.

(Seal)

PAUL P. O'BRIEN

Clerk, U. S. Circuit Court of Appeals for the Ninth
Circuit

By Frank H. Schmid

Deputy Clerk

[Endorsed]: No. 19112. Filed Mar. 21, 1947.

[Title of Circuit Court of Appeals and Cause]

STIPULATION AND EXTENSION OF TIME FOR
RECORD ON APPEAL

It is hereby stipulated, by and between the parties herein, through their respective counsel, that the time for filing the record on appeal herein, under and pursuant to Rule 39(c) of the Federal Rules of Criminal Procedure, may be extended from the forty day period to and including an additional thirty days.

Dated this 26th day of March, 1947.

VINCE MONROE TOWNSEND, JR.

Attorney for Appellant

PAUL FITTING

Attorney for Appellee

ORDER

Under and Pursuant to Said Stipulation, It Is so Ordered.

Dated this 28 day of March, 1947.

CLIFTON MATTHEWS

Judge of the Circuit Court of Appeals in and for the
Ninth Circuit.

A True Copy. Attest: Mar. 31, 1947.

(Seal)

PAUL P. O'BRIEN

Clerk

[Endorsed]: Filed Mar. 31, 1947. Paul P. O'Brien,
Clerk.

[Endorsed]: No. 19112. Filed Apr. 1, 1947.

[Title of Circuit Court of Appeals and Cause]

STIPULATION AND EXTENSION OF TIME FOR
RECORD ON APPEAL

It is hereby stipulated, by and between the parties herein, through their respective counsel, that the time for filing the record on appeal herein, under and pursuant to Rule 39(c) of the Federal Rules of Criminal Procedure, may be extended to and including an additional thirty days.

Dated this 28th day of April, 1947.

VINCE MONROE TOWNSEND, JR.

Attorney for Appellant

PAUL FITTING

Attorney for Appellee

ORDER

Under and Pursuant to Said Stipulation, It Is so Ordered.

Dated this 29th day of April, 1947.

ALBERT LEE STEPHENS

Judge of the Circuit Court of Appeals in and for the
Ninth Circuit

A True Copy. Attest: May 2, 1947.

(Seal)

PAUL P. O'BRIEN

Clerk

[Endorsed]: Filed May 2, 1947. Paul P. O'Brien,
Clerk.

[Endorsed]: No. 19112. Filed May 5, 1947.

[Title of Circuit Court of Appeals and Cause]

POINTS RELIED UPON ON APPEAL

The points upon which Appellant relies on appeal are as follows:

I.

The Indictment and Each Count Thereof, Fails to Describe or Charge Any Public Offense Against the United States or Any Penal Law Thereof.

Count I of the Indictment fails to charge a Public Offense or any Violation of Title 18 U. S. C. A., Section 318.

It fails to allege or show whose property was embezzled and secreted.

It fails to aver that the act charged against the accused was wilfully or unlawfully or feloniously performed.

It fails to set forth or describe the sender of the alleged package or to aver that such sender intended that it should be conveyed by mail to the addressee.

Count II of the Indictment fails to charge a Public Offense or any Violation of Title 18 U. S. C. A., Section 318.

It fails to aver that the sender of the alleged package intended it to be conveyed to the addressee, Mrs. A. S. Cuff, by mail or otherwise.

It fails to allege that the accused wilfully, or unlawfully or feloniously detained and/or delayed the package involved.

II.

The Evidence Is Insufficient and There Is No Substantial or Competent Evidence to Support the Judgment.

a. The evidence fails to show that either of the packages involved were ever in the United States Mails.

b. Such evidence fails to show that either of said packages ever came into or were in the custodial possession of the accused.

c. Such evidence fails to show that either of the alleged senders of said packages intended them to be delivered to the persons to whom they were addressed.

d. The Government's evidence conclusively establishes that it was the intention of the actual senders and depositors of said packages that they should be repossessed in the Los Angeles Post Office and should not be mailed or actually delivered by mail to the persons to whom said packages were addressed.

e. Such evidence fails to show that the accused detained or delayed the progress through the United States Mail of the packages, addressed to Mrs. A. S. Cuff or that it was detained or delayed otherwise than by passing through ordinary routine procedure and red tape, pursuant to practice and rules of said Los Angeles Post Office.

f. The evidence produced by the Government merely proves that imperfect and incomplete decoy procedure was used in which assignments (a), (b), (c), and (d) above were missing.

g. The evidence is legally insufficient to show that the accused ever intended to detain or delay said last named package or to steal or secrete or embezzle the package described in the first count of the indictment.

GLADYS TOWLES ROOT

Attorney for Appellant

[Endorsed]: Filed Jun. 28, 1947. Paul P. O'Brien,
Clerk.

No. 11557.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM GATHER KELLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

GLADYS TOWLES ROOT,
631 Bartlett Building, Los Angeles 14,
Attorney for Appellant.

FILED

OCT 10 1937

PAUL R. BROWN

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No. 11557.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM GATHER KELLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

*To the Honorable the Ninth Circuit Court of Appeals of
the United States:*

Jurisdiction.

Jurisdiction is conferred by Section 41, Title 28, U. S. Codes and by Section 225, Title 28, U. S. Codes. The punishment provided for violation of the law involved includes imprisonment for not more than five years.

The defendant was indicted for violation of two provisions of Title 18, Section 318, U. S. Codes. He was a custodial laborer in the United States Postal Service in the Post Office in Los Angeles, California. He waived a jury [Rep. Tr. p. 4], and was tried by the Honorable Wm. C. Mathes, Judge of the District Court. He was found guilty of both charges and judgment thereon was, on February 10th, 1947, pronounced whereby he was sen-

tenced to serve two years imprisonment by reason of conviction under the first Count and two years suspended sentence on the second, the sentences to run consecutively. [Rep. Tr. pp. 7, 8.]

Statement of the Case.

The charging part of the indictment reads:

“The grand jury charges:

COUNT ONE

(U. S. C. Title 18, Sec. 318)

On or about December 21, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant William Gather Kelley, being a person employed in the United States Postal Service as a custodial laborer in the Los Angeles, California, Post Office, did secrete and embezzle a package which came into his possession as said custodial laborer, and which was intended to be conveyed by mail, addressed to Mrs. E. Johnson, 1706 South Hoover, Los Angeles, California. (2)

COUNT TWO

(U. S. C. Title 18, Sec. 318)

On or about December 21, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant William Gather Kelley, being a person employed in the United States Postal Service as a custodial laborer in the Los Angeles, California, Post Office, did unlawfully detain, delay, and open a package which came into his possession as said custodial laborer, and which was intended to be conveyed by mail, addressed to Mrs. A. S. Cluff, 2026 South Burnside, Los Angeles, California.” [Rep. Tr. pp. 2 and 3.]

We copy Section 318, U. S. C. below but add the paragraphing so as to indicate the separation of the two offenses which it describes:

“Whoever, being a postmaster or other person employed in any department of the postal service, shall unlawfully detain, delay, or open any letter, postal card, package, bag, or mail entrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of a postal service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster;

Or who shall secrete, embezzle, or destroy any such letter, postal card, package, bag or mail; or shall steal, abstract, or remove from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than \$500.00, or imprisoned not more than five years, or both . . .”

The questions to be relied upon are covered by a limited portion of the reporter's transcript; hence other portions will be pointed out giving the substance, only of the testimony to be found in the reporter's transcription of the evidence.

The Government proved by Charles Franzen, Assistant Superintendent of Mails that on December 21, 1946, he received from Inspector R. E. French two packages, both of which he identified, the first of which was addressed to Mrs. E. Johnson at a named address, and was marked “Government's Exhibit No. 2”; the second when presented in court had been divided into two parts, which were numbered Exhibits 3 and 4. [Rep. Tr. pp. 17-19.]

The witness testified that he placed the packages at two stations in the Post Office as directed by Mr. French, Exhibit No. 2 in "Pico Heights Station" [Rep. Tr. p. 22] and the other package at "Station E," being places where mail is picked up [Rep. Tr. pp. 23, 24]; that later that morning Mr. French told Franzen to go to these stations and see if the parcels were still there; he did so and they were gone [Rep. Tr. pp. 24-26]; that he so informed French by signal [Rep. Tr. p. 24], and later Franzen and Kinny, foreman of janitors, returned to the Pico area where the defendant was working as a janitor [Rep. Tr. pp. 27-30]; that Franzen and Kinny got the trash hampers being used by the defendant, and dumped the contents on the floor and found therein Exhibit 2, intact, and the package Exhibit 4, with its wrapper torn off, the wrapper, being Exhibit No. 3. [Rep. Tr. pp. 30-34.] Franzen said he placed Government's Exhibit 2 on a wooden platform 8 inches or a foot above the floor beneath a metal rack in which mail bags are hung, and he put the other package on a tray at "Station E." [Rep. Tr. p. 23.]

The above is from the testimony of Franzen on direct examination.

Alfred E. French, testified that he was employed at said Post Office as "Post Office Inspector," and on December 21, 1946 saw the defendant Kelley; that the packages above mentioned had been prepared by him and Inspector Shore and Post Office Clerk Surdam; that Government's Ex-

hibit 2 was in substantially the same condition as when they prepared it, and Exhibits Nos. 3 and 4 were the same except that when prepared they were all one piece sealed with tape; that at 5 minutes after 5:00 A. M. of December 21, 1947, he handed the packages to Franzen and instructed him to place them where Franzen testified he placed them, and he, French went to the observation gallery and kept on outlook [Rep. Tr. pp. 60, 61]; that he saw Kelley get janitor utensils and sweep in the areas where the packages were placed, and that he saw Kelley pick up Government's Exhibit No. 2 and throw it in the direction of his trash pile [Rep. Tr. pp. 65-68]; that Kelley continued sweeping and French telephoned Franzen to look and see if he could find the packages, Exhibit No. 2. [Rep. Tr. pp. 71, 72.] Slight delay is not "unlawful," and a janitor who carelessly or inadvertently causes such delays cannot be held guilty of embezzling or unlawfully detaining packages intended to be conveyed through the United States Mail. That thereafter French left the gallery [Rep. Tr. p. 75], and eventually with Franzen with him and Kinny behind, French walked up to Kelley and asked where the package was that had been placed on the table and what he had done with it, and that Kelley said he denied that he had any knowledge as to what happened to the packages or having taken them. [Rep. Tr. pp. 86, 87.]

On cross-examination Mr. French stated that the reason that he presumed that Kelley wanted to secrete the package Exhibit No. 2 when he threw it onto the trash

pile was that he had received suspicious reports and complaints about Kelley, and things had disappeared from the part of the building where Kelley worked. [Rep. Tr. pp. 107-116.]

It was stipulated that Roy Kinney, foreman of janitors would testify as follows:

“Mr. Fitting: Mr. Kinney will testify that all the custodial laborers, including Mr. Kelley, were instructed that they were not to touch mail at any of the places where mail was customarily put or kept. He will also testify that if they found any mail or packages on the floor, or any places where mail did not belong, they were to pick it up and put it on any of the tables or racks that were around there [Rep. Tr. p. 144]”; also, that Kinney would testify “that his particular duties were to sweep all areas, including the cleaning of the sack racks; that the instructions with regard to the handling of mail was contingent upon his knowledge that it was mail.”

Greater detail in the statement of the evidence would be superfluous because appellant admits that the proof is sufficient in showing that the decoy letters were placed within the areas of the defendant's work as a custodial laborer and that he threw them into the hamper with the trash which he collected and that he denied all knowledge of their being in such trash.

The pertinent evidence which relates to the points relied upon on appeal will be set forth in connection with arguments upon them and the substance of all the pertinent evidence is set forth in the appendix to this brief.

I.

The Evidence Is Insufficient and There Is No Substantial or Competent Evidence to Support the Judgment.

1. The evidence fails to show that either of the alleged senders of packages intended them to be delivered to the addrses.

In *United States v. Matthews*, 35 Fed. 890, the defendant was indicted for violation of the first offense described in Section 5467 of the Revised Statutes, being the offense charged against Kelley in Count I of the instant indictment.

In discussing the element of the offense which requires that the letter there involved was "intended to be conveyed by mail" to the addressee the opinion states:

"A letter intended to be conveyed by mail is one which is intrusted to, or comes to the possession of, some postal employee to be transmitted, by means of the mail or mail agencies of the United States, to the person to whom, under whatever name, it is addressed; or, which is the same thing, to some person authorized to receive it, from the mail before or after it reaches the particular place to which it is directed. It cannot be that a letter is intended to be conveyed by mail, within the meaning of the statute, when the postal authorities, acting in co-operation with the sender, intended after the letter is put in the mail, to resume possession of it themselves, or to permit the sender to do so, before it reaches the hands of any carrier, messenger, or other postal employee, for delivery to the proper person." (35 Fed. pp. 894, 895.)

In the instant case it appears that the Government's Exhibit 2, which was addressed to "Mrs. E. Johnson, 1706 South Hoover, Los Angeles," and which pertains to the first Count, was never sent to the person to whom it was addressed, although Inspector French received it after Mr. Franzen found it in the defendant's trash. It appears that this exhibit had on it "cancelled United States postage stamps," at the time it was received in evidence and Mr. Franzen identified it. [Rep. Tr. p. 18.] Later in his testimony this witness swore that Exhibit 2 "is still in the same condition as it was when I placed it on the Pico rack." [Rep. Tr. p. 32.] However, he qualified this testimony by stating that certain initials had been placed on the exhibit in the Inspector's office after he found the package, and then said: "Except for those initials, that package is in the same condition." [Rep. Tr. p. 33.]

It is therefore incontrovertable that the cancelled United States postage stamps were on Exhibit 2 when it was handed to Mr. Franzen by Inspector French and when Franzen placed it as a decoy on a rack [Rep. Tr. p. 23], as directed by Inspector French.

What may have been the Inspector's purpose in using cancelled postage stamps on this decoy package is not a question for appellant to speculate upon.

The record contains no testimony or evidence tending to contradict Mr. Franzen's testimony above quoted to which defense counsel strenuously objected but the objections were overruled. [Rep. Tr. p. 32.]

No witness testified that Exhibit 2 was mailed to Mrs. Johnson after it had been repossessed by the Inspector.

It is to be noted that although he qualified his testimony later, Mr. French asserted that his purpose in having the package deposited on the rack was, "seeing the package in his hands." [Rep. Tr. p. 106.] Again the witness said "the purpose was to try to determine who was stealing these parcels on the third floor of the Terminal Annex"; and "that was the sole purpose"; and there was "no other purpose whatsoever but that." [Rep. Tr. p. 112.] However, when asked whether he had any intention of mailing the packages, Mr. French at first parried the question and finally said: "Well, I am sorry, but when you begin to get technical on it, then I have to tell you that there was a purpose for these articles to reach the addresses." [Rep. Tr. p. 113.] Hence, appellant insists that it is both logical and supported by the *Matthews* case decision to conclude that Exhibit 2 was not "intended to be conveyed by mail" to the addressee "or to be conveyed from the Inspector's possession to Mrs. E. Johnson at all."

This being the fact the offense charged in Count I was disproved by the Government's own witnesses, and the defendant's evidence fails to mention the condition of the exhibits or any other circumstance even remotely bearing upon this essential element of the sender's intent.

2. The offense charged in Count II has no support in the evidence and the judgment thereon is not sustained by the evidence.

The Government attorney elicited from Mr. Franzen the same lack of intent that Government's Exhibits 3 and 4 should be conveyed by United States mail to the addressee as has been shown in respect to Count I.

Exhibits 3 and 4 were identified by Mr. Franzen as a package [Ex. 4], originally contained in a wrapper; [Ex. 3], which wrapper bore "a six-cent cancelled United States postage stamp, bearing address to 'Mrs. A. S. Cluff, 2026 South Burnside Avenue, Los Angeles, California.'" [Rep. Tr. p. 19.]

Then, the following questions by the prosecutor and answers by Mr. Franzen were asked and given:

"Q. Now directing your attention to Government's Exhibits for identification 3 and 4, are they in the same condition as they were when you put them in Station E? A. No. When I put these in Station E they were wrapped in one parcel. I didn't see this at all when I put it down there.

The Court: That is the box, Exhibit 4 for identification?

The Witness: That is right.

The Court: It was wrapped in the wrapper, Exhibit 3 for (24) identification; is that what you mean?

The Witness: Yes, sir.

Q. By Mr. Fitting: Now directing your attention to the wrapper, Exhibit 3, that, again, has some initials on it, does it not, Mr. Franzen? A. Yes, sir.

Q. Were those initials on there when you placed that wrapper on the table in Station E? A. No; they were not.

Q. Are your initials on there, Mr. Franzen? A. Yes, sir; right here, 'C. O. F.'

Q. You are referring now to the initials in the lower left-hand corner of the front of the wrapper? A. That is right.

Q. Are your initials also on this box marked Government's Exhibit No. 4? A. Yes, sir; they are my initials.

Q. And they are in the upper left-hand corner, are they? A. Yes, sir.

Q. That is 'C. O. F.'? A. That is right.

Q. When did you put your initials on Exhibits 3 and 4, Mr. Franzen? A. I put my initials on there sometime later, down in (25) the inspector's office. I don't kow just when." [Rep. Tr. pp. 33 and 34.]

Hence with the exception of the wrapper having been removed from the package and certain initials having been placed on the wrapper, it is Mr. Franzen's testimony that the wrapper, with the address and the cancelled postage stamps on it was in the same condition when shown to him at the trial as when he "put them in Station E," on a tray. [Rep. Tr. p. 23.]

Exhibits 3 and 4 were found by Franzen in the trash which was dumped from Kelley's hamper by Franzen and Roy Kinny. [Rep. Tr. p. 31.] Mr. Franzen testified that the initials were placed on the packages in the Inspector's office after they had been found in the trash. [Rep. Tr. pp. 31-34.] Hence, the packages were traced back to the Inspector's possession and control but no one testified that unstamped postage was thereafter placed upon them or that they were ever re-mailed to the addressee. These decoy packages were purchased and put together by Inspector French, Postal Inspector Shore and Mr. French's secretary, Mr. Surdam. Shore addressed Exhibit 2 and Surdam addressed the one addressed to Mrs. Cuff. French said: "They were prepared in my

office.” He said that he and Inspector Shore paid for the articles which were put in the packages; that he did not know the addressees personally but they were Christmas presents to somebody. [Rep. Tr. pp. 113, 114.] Thus the preparation procedure actually followed is outlined and the Inspector gave these cancelled stamped packages to Franzen to put in the United States Mail by placing them at spots where they would be picked up for conveyance through the United States Mail. However, it is common knowledge that a letter or package with nothing but *cancelled* stamps on it would never reach the addressee, and it follows that for a postal inspector to deliberately deposit mail matter in the way of entering into the United States Mail using only cancelled stamps as postage clearly indicates an intention that they should be returned to him and that he had no thought of making Christmas presents to strangers.

3. The Evidence fails to show that the defendant secreted or embezzled the packages involved herein or unlawfully detained or delayed them.

Even if Kelley had tossed the package into his trash he would not have taken them out of the custodial custody of the Postoffice or out of the mail.

On cross-examination Inspector French testified that “trash goes to the basement,” and “it is sorted through” by a “custodial employee who is assigned to the duty.” [Rep. Tr. p. 135.] The purpose, he said, is to “screen the mail that might be lost in the trash”; that it is well known the “mail load increases tremendously during the 10 days before Christmas,” and, in the aggregate the probability of mail getting inadvertently mishandled or

lost becomes greater during that season. [Rep. Tr. pp. 137, 138.] Mr. French described the screening process as follows:

“I found several hampers setting around there that had trash in them, evidently, and found a screen that where they run the hamper up on an elevated platform and dump it and sort the trash through this screen and pull out any mail that might have inadvertently gotten in.” [Rep. Tr. p. 136.]

Kelley testified that the janitors put their trash in hampers, and take it to the basement in the elevators. He said “you carry it to the assorting room,” not to the incinerator [Rep. Tr. p. 155]; but the incinerator is also in the basement. [Rep. Tr. p. 153.]

From the foregoing it is shown that a very substantial amount of mail matter is found in the trash and that this is ordinarily regarded as due to inadvertence of employees, and the screening process is a part of the route through which all such screened articles pass in their transition through the mails. Of course all janitors are familiar with these facts and know that trash which is placed in hampers will be screened and that articles intended to be mailed will not be lost. They remain in custodial possession during the whole process as much as when being passed from one clerk to another, and the resulting delay is inconsequential and must be regarded by the Postoffice authorities as excusable, otherwise they would be subject to prosecution for the offense charged in Count I of the indictment.

II.

The Indictment Fails to Charge a Public Offense or Any Violation of Title 18 U. S. C. A., Section 318.

By the indictment an attempt is obviously made to charge offenses denounced in the above named section. Both counts employ language which indicates a design to charge the second offense defined in said Section 318.

Count I avers that:

“On or about December 21, 1946, William G. Kelley, being a person employed in the United States Postal Service as a custodial laborer in the Los Angeles, California Postoffice, did secrete and embezzle a package which came into his possession as a custodial laborer, and it was intended to be conveyed by mail, addressed to Mrs. E. Johnson, 1706 South Hoover, Los Angeles, California.”

The foregoing language is insufficient to the following respects:

1. This charge fails to aver the name of the sender of the package or to identify the sender in any way.

2. It fails to allege that the sender intended that the package should be conveyed by mail to the address and person addressed. In *United States v. Matthews*, 35 Fed. 890 the court held that to constitute the offense of secret-ing, embezzling, and destroying a letter intrusted to a postal employee, it is essential to a conviction that “such letter was intended to be conveyed by mail or carried or delivered by a mail carrier” or other person specified in the law.

If the name of the sender were given it might be implied that the language, “it was intended to be conveyed by mail,” etc., referred to that person.

3. It has been held that in laying this charge the pleading must aver that the property embezzled belonged to someone other than the accused.

United States v. Foye, Fed. Cas. No. 15,157;

United States v. Cummings, Fed. Cas. No. 14,695.

As the instant charge reads the package may have been prepared and mailed by the accused.

4. It is not averred that the accused intended to appropriate the package. It is said that he "did secrete and embezzle" the package, but this averment is a pure conclusion of law, and it was held in *Jones v. United States*, 27 Fed. 447, that where the accusation is in the language of the statute herein involved it is necessary to allege that the taking was wrongful and with felonious intent, citing *United States v. Carll*, 105 U. S. 611. As the *Jones* case opinion points out the crime denounced is "an aggravated larceny," and to constitute that offense the element of intent above mentioned exists although not found in the statute.

Count II alleges that the accused,

"did unlawfully detain, delay and open a package which came into his possession as said custodial laborer, and which was intended to be conveyed by mail, addressed to Mrs. A. S. Cluff, 2026 South Burnside, Los Angeles, California."

This count has the same defects as Count I except that it is alleged that the acts described were done "unlawfully." Count II attempts to charge the first of the two offenses described in said Section 318, and as it involves no element of misappropriation or larceny the term unlawfully may suffice.

However, it is insufficient because:

1. It fails to name or identify the owner or sender of the package.

2. It fails to aver that such owner or sender intended the package to be conveyed by mail to the addressee.

It requires no authority to show that the intent that the letter or package shall be conveyed by mail, etc., is essential because the wording of the first portion of Section 318 clearly includes that fact as an element of the offense.

Upon each of the foregoing counts appellant contends that the judgment below should be reversed.

Respectfully submitted,

GLADYS TOWLES ROOT,

Attorney for Appellant.

APPENDIX.

The Evidence.

All of the evidence pertinent to the issues presented will first be set forth. The evidence intended to support the charges against Kelley consists chiefly of testimony of Post Office Inspector Alfred E. French. He stated that on the morning of December 21, 1946, he saw the packages which had been marked for identification, Government's Exhibits 2, 3 and 4, and that they "had been around in our office previously"; that they were prepared by Post Office Inspector Shore, Post Office Clerk Harvey Surdam, and himself. [Rep. Tr. pp. 59, 60.] He testified that on said date, at "five minutes after 5:00 he instructed Mr. Franzen where to put these packages and he "then proceeded to go to the observation gallery on the third floor." [Rep. Tr. p. 61.] The witness referred to Government's Exhibit No. 1, a diagram, and stated that he went to a point which he marked "E" thereon [Rep. Tr. p. 62]; he testified that it took him about 5 minutes to reach that point. He said Government's Exhibit for identification No. 5, was an accurate representation of the floor of the Post Office as viewed from the gallery at Point "E." [Rep. Tr. p. 63.] French said he saw Mr. Franzen place Government's Exhibit 2 on a sack rack shown on Exhibit 5 at a point marked "A," and saw him turn to his right toward the spot on said Exhibit 5, marked "B," taking with him Exhibits 3 and 4. [Rep. Tr. pp. 64, 65.] Mr. French said he saw Kelley at "about

5:15 A. M.”; saw him go to the janitors closet where Kelley “conversed for a few moments” with “another colored man,” and then “obtained his broom, walked over to a point West” of “the janitors closet” and start sweeping; he swept from the wall “on the West side of the building, east, out into the aisle.” [Rep. Tr. pp. 66, 67.] This sweeping is not shown on the diagram; the witness saw Kelley “go around and take the nearest route to the men’s lavatory, and French moved to another point in the gallery and observed Kelley until he left the lavatory and then at about 5:30, Kelley “started sweeping the pile of trash South.” French said: “I couldn’t see it (the trash pile) any too well underneath the gallery there.” [Rep. Tr. p. 69]; this point marked “F” is east of point “A.” Then from point “F” Kelley “came in to the Pico Heights Station Section, by going West from F, where he “picked up Exhibit No. 2 from the sack rack.” French said: “He looked at it a moment and then swung his body all the way around to the right and threw the package in the direction of the trash pile.” [Rep. Tr. pp. 70, 71.] Then, French said, Kelley pushed “the racks, the sack racks, up together more compactly, and then swept that area,” but before that that he emptied two waste paper baskets there on the trash pile and “then obtained some sweeping compound to throw over the pile and then swept that area out,” referring to the Pico Heights general area [Rep. Tr. p. 71]; swept this into pile “F,” and then “pushed that pile up the aisle, going South as before, using his broom. He did this to a point marked “G” in another Station. [Rep. Tr. p. 72.] “He then swept the area West of “G” and swept “that pile South down the aisle.” French said: “I saw him turn in at approximately the point

“H,” almost due East of “B.” [Rep. Tr. p. 73.] French said he did not see Exhibit 2 after Kelley threw it “toward the trash pile.” [Rep. Tr. p. 74.] French said:

“A. I waited at the observation point ‘E’ for a few moments, and then I telephone Mr. Franzen, the supervisor in charge of the building at the time, and asked him—I told him that the defendant, whom I later learned to be Kelley, had turned into the Station ‘E’ area at the southwest corner of the building, and instructed him to come out and see if he could find the package which he had placed at point ‘A.’ So I saw him come into that section and observe closely in every direction from the point where he had left the package, and then he stood there a moment and scratched his head, indicating to me that he could not find the package. I next saw the defendant about 5:45. I left the lookout gallery and went down through my office and around to the stairway in about the middle of the building, which is—

Q. Are you speaking of this? A. No; I am not speaking of that, but the area near the tie section, which would be off the diagram and to the north of the point ‘E.’ I then came down a place well out of sight on the east side of the building.” [Rep. Tr. pp. 74, lines 10 to 17 and lines 21 to 25; Rep. Tr. pp. 75, lines 6 to 13; Rep. Tr. p. 77.]

The witness said Government’s Exhibit for identification “No 6,” fairly depicts the scene that he could see from point “1,” and “I saw the defendant bending over the trash hamper . . . I mean this canvas tub which is generally used by the janitors in depositing their trash before taking it down to the basement. I saw the hamper at just before leaving the lookout gallery.” [Rep.

Tr. p. 79.] “I saw the hamper being pushed by Mr. Kelley down the aisle in the direction of the Station ‘E’ area. He was out of my observation for a moment when he went down to get the hamper. I could not see exactly the point. He came down the aisle north and turned to approximately past the point ‘C,’ and went over toward the northeast part of the diagram. The pile had already been put into the Station ‘E’ area.” [Rep. Tr. p. 80.] “I couldn’t observe the point at which he got the hamper, then at point he turned west with the hamper, as he had with the sweeping.” [Rep. Tr. p. 81.] I saw him go east past point “C”; then he got out of my sight, when he came back he had the hamper with him. [Rep. Tr. p. 81.] “I don’t know what Kelley was doing when I observed him bending over the hamper. [Rep. Tr. p. 83.] After I left the spot marked ‘I’ on Exhibit No. 1. [Rep. Tr. p 85.] I stopped in the placing table section or letter distribution area of the floor and sought to get in touch with Mr. Franzen.” [Rep. Tr. p. 86, lines 6-8.] “As nearly as I can remember, before reaching this aisle here we traversed approximately this route here from the point marked ‘C’ and into the aisle, and where we turned south.” [Rep. Tr. p. 87, lines 15-18.] “While on that route I saw Kelley as soon as I reached the area of . . . is that an ‘H’.” [Rep. Tr. p. 87, lines 20-21.] “Mr. Franzen was directly with me, and Mr. Kinny, I motioned for him to remain behind for a moment. Kelley was just standing there. I don’t really remember. I didn’t notice whether he had anything in his hand or not. I walked up to him and asked him where the package was that had been placed on the table. I had first asked Mr. Franzen where he placed the package, and he showed me where he had placed it on the table. And

I asked Kelley what he had done with the package. Kelley said, 'What package?' I would say that there was some conversation. I sent Mr. Franzen back to bring the trash tub into the area there, and in the course of that time, as I remember it, I told Mr. Kelley that there had been a package there and" [Rep. Tr. pp. 88-89, lines 3-4, 9-10, 13-14, 16-18, 20, 23; p. 88, line 1.] "And Mr. Kelley and I discussed the package. He disclaimed any knowledge of it and I asked him several He said that he didn't have any package and wondered what I was . . . and he asked what I meant by a package and. . . ." [Rep. Tr. p. 89, lines 6-7, 23-25.] "I told him that Mr. Franzen had left a package there on the table and now it was gone; there had been no one else in there and that he must know what had happened to the package; and he denied it. In the meantime Mr. Franzen had gone after the trash tub and he brought it up, and Mr. Kinny who, I believe, was close enough to observe what was going on, at that time came in and I felt of Kelley's clothing to see whether there was any bulk in there to indicate that he had taken any of the articles out of the packages and placed them in his pockets." [Rep. Tr. p. 90, lines 2-5 and 7-12.] I asked Mr. Kelley about the package marked for identification Government's Exhibit 2, referred to as the "Pico package." [Rep. Tr. p. 91.] "I asked him what he did with the package that he had taken from the sack rack. He said that . . . he denied having taken any package there and said he didn't know what I was talking about. By that time Mr. Kinny and Mr. Franzen were right there along with Kelley and myself and the trash tub, and I reached into the trash to see if I could find the packages in it and could not do so at first; and so we decided to

turn the hamper upside down and dump all of the trash out onto the floor, and we first found this package. Exhibit No. 2. And then I think Exhibit 3 was the one that we found next, and then we found the wrapper, or it might have been vice versa, they were found so nearly or close to each other in point of time." [Rep. Tr. pp. 92, 93.]

By Mr. Fitting: Now, Mr. French, did you see anyone go into the area marked "A" on this diagram in the period between the time that Mr. Kelley threw the package out and Mr. Franzen came in the second time to see if it was there?

"There were three or four mail handlers who came in there." "In all that time while I was watching I did not see anyone go in the general area marked 'B.'" [Rep. Tr. p. 95.]

Cross-examination by Mr. Townsend:

Concerning the packages, Exhibits 2, 3 and 4, Mr. French testified: "Postal Office Inspector Shore and my secretary, Mr. Surdam, and myself prepared these packages. There was a pair of socks placed in one of them and one or two handkerchiefs placed in the other. Mr. Surdam addressed this Exhibit 3 and Mr. Shore addressed Exhibit 2. Mr. Surdam, my secretary, addressed Exhibit 3. The one addressed to Mrs. A. S. Cluff was addressed by Mr. Surdam. They were prepared in the office. The purpose was to try to determine who was stealing these parcels on the third floor of the Terminal Annex." [Rep. Tr. pp. 124-125.] "Mr. Shore addressed Exhibit 2. The sole purpose of their being prepared was to determine who was stealing parcels. No other purpose whatsoever

but that. They were mailed. They were duly mailed and addressed and the return address . . . rather, the addressees are living people, and if they had gone through they would have been given to those people. There would have been a purpose in them reaching the addressees if they were not taken before that. The purpose would have been for them to reach the addressees. That was the prime purpose, to see if they would reach the addressees.” [Rep. Tr. pp. 126-127.] “When you begin to get technical on it, then I have to tell you that there was a purpose for these articles to reach the addressees. There were more return addressees on them. C. C. Heaven was the sender. He is a real person. Mrs. E. Johnson is the addressee on them. She is a real person. She was an acquaintance of one of the group, not of myself. I think she was probably an acquaintance indirectly of possibly Inspector Shore. The contents of the package were purchased as a Christmas present for somebody; partially out of my money. I bought a Christmas present for someone whom I admittedly do not know.”

Mr. French described the incinerator room and the process of screening mail for letters and packages inadvertently mixed up in trash, and in that behalf testified: “I don’t know what they do with the trash. Not in detail; no. I know that the trash eventually arrives in the basement, but just what route it takes to get there I would not be able to tell you. I do not inspect where the custodial labor would carry their trash. I know that trash goes to the basement, and it is sorted through. The custodial employee who is assigned to the duty does the sorting through. The other day I was down in the room where they sort through the trash. But I don’t

know where they took it from. I found several hampers setting around there that had trash in them, evidently, and found a screen there where they run the hamper up on an elevated platform and dump it and sort the trash through this screen and pull out any mail that might have inadvertently gotten in. The hampers that I saw were not all empty. There were some with contents in them. The contents was trash. I observed a gentleman there doing the sorting. He was not actually working at the time I was there. The purpose of sorting is to get rid of the trash. Of course, before it is disposed of, to look through it and extract any pieces of mail that might have been inadvertently mixed up in it."

"Q. Isn't it a fact, Mr. French, that the specific purpose of this assignment is to screen mail that might be lost in the trash? A. That is correct.

Q. That is quite regularly done, isn't it? A. Yes. It is heavier in the Christmas season than any other time of the year. They are no more particular with it at Christmas than they are any other time. They are always supposed to be careful with the sort of matter. We have to have added personnel to sort and handle mail during the Christmas season. And the probability of mail getting either inadvertently mishandled or lost becomes greater at that particular season—in the aggregate." [Rep. Tr. pp. 154, 155, 156, 157, 158 and 159.]

Concerning the personal knowledge of Mr. French that Kelley took possession of the packages involved he testified:

"Q. At no time did you see either of these packages, either 2, 3, or 4 in the defendant's personal possession?

A. Yes; I saw it in his possession when he picked that package off the sack rack. His back was turned to me when he picked it up. And then he swiveled around, facing me, and then went on around to a point where I was facing the trash pile. And he picked that up from the sack rack floor there and threw it some three or four feet directly into the trash pile. After he had dumped a couple of pails or buckets of wastepaper in it and got some sweeping compound, why, then he proceeded to sweep. That immediately followed the throwing of this package into the trash. Immediately following, he first pushed the racks up compactly after throwing the package, and then dumped the wastebaskets and the sweeping compound. Those were his duties, except for the picking up of the package." [Rep. Tr. pp. 162, 163 and 164.]

With reference to finding the packages the witness testified: "I found the hamper about two-thirds full. The two packages that I found in the basket were pretty far down. I would say they were approximately in the middle of the pile, although we did not take a ruler out and measure it. Before we finally got the packages we had to pull a lot of trash away and dig down into it to find them. And after having found the packages in this sack of trash I then immediately said to the defendant: "What did you do with that package?" I insisted that he did know something about it. And he equally as energetically denied any knowledge of it apart from any other trash." [Rep. Tr. pp. 152 and 153.]

Charles Franzen, assistant superintendent of mails, testified: "I first saw this package, Government's Exhibit for identification No. 2, addressed to Mrs. E. Johnson at 5 minutes past 5:00 A. M., December 21, 1946, in Inspector French's office. I first saw this wrapper from

a package, addressed to Mrs. A. S. Cluff, 2026 South Burnside Avenue, Los Angeles, California, marked Exhibit 3 for identification at the same time and place, and also the box, Exhibit 4 for identification, which was wrapped up, in one package with Exhibit 3. [Rep. Tr. pp. 4-8.] Mr. French gave me an instruction. I placed these packages on the third floor. I placed Exhibit 2 in the Pico local section at a point on the diagram, Exhibit 1, marked 'A.' [Rep. Tr. pp. 9, 10.] I put it on a sack rack. It is a rack, a platform about eight inches above, or so, a foot above the floor, and there is a metal rack on there in which the mail bags are hung. I put it on the wooden platform. I guess the purpose of the wooden platform is just to support the metal structure of the rack. [Rep. Tr. p. 11.] I put this package, Exhibits 3 and 4, back in the station E, paper section, on a tray. It is a tray about four feet long and a foot and a half wide, on castors. It is about a foot and a half high. The part that holds the mail, I would say is six inches deep. We pick up our mail out of the cases and roll it around to the different stations to work it, and work it off of these trays into the cases. There might have been two or three small papers there when I placed the package in it. I left and went on about my business. Between 5:30 and 5:40 Mr. French called me and asked me to go back in the Pico section and see if that first parcel, Exhibit 2, was still there. I did not find the parcel. About 5:45 Mr. French called me again. He asked me to come back. I went back, watched the hamper." [Rep. Tr. pp. 12, 13 and 14.]

The witness marks the letter "C" where he said he saw the hamper. "Mr. Kelley was pushing the hamper.

He left the hamper there and went back in the Station E paper section in that vicinity. One of the foremen came and told me that Mr. French was looking for me. I left this area then. We came back about five minutes later, I would say getting close to 6:00 o'clock. Mr. French and I approached the area. The general area where we placed the mark 'B.' Mr. Kelley was standing about here. Just standing. Mr. French asked me if the parcel, if 3 and 4 was where I had placed it, and the parcel was not there. I looked. Mr. French told me to get the foreman of the janitors, which I did. Mr. Kinny, I believe his name is. The two of us came back. Then we got the hamper from here at location 'C.' We brought it down here where Mr. French and Mr. Kelley was. We started looking through the hamper for these parcels. Mr. French, first, and he couldn't find it. He started pawing through it. We dumped it out on the floor finally. I found this one intact (referring to Government's Exhibit 2); then I found this (referring to Government's Exhibit No. 4), and then we found this (Government's Exhibit No. 3 for identification); Exhibit No. 2 was in the same condition as it was when I placed it on the Pico rack. These initials below here are my initials. I put my initials on this parcel to identify it. I put those on down at the inspector's office, later, after we had found the package. There are other initials on that package but I can't read them. They are not my initials. There are initials on the back, but they are not my initials. As to Government's Exhibits for identification 3 and 4, when I put these in Station E they were wrapped in one parcel. Those initials on Exhibit 3 were not there when I placed that wrapper on the table in Station E. I put my initials on there sometime later, down in the in-

spector's office. I don't know just when. When I went to 'A' I did not see the defendant Kelley anywhere.* I heard him; he was singing." [Rep. Tr. pp. 14-27.]

Cross-examination:

"This was about the time when our Christmas rush is just about the peak. Kelley was singing loudly. There were about three or four mail handlers hanging sacks at that time. They were by the mark 'A.' They were hanging sacks on these sack racks. They were scattered around in there [Rep. Tr. pp. 30-33]; Exhibits 3 and 4 were placed upon a sack rack resting on some wooden post or platform. In the same area in which I mentioned a moment ago that there were three or four people working. Where I made the mark 'A.' They were Christmas temporary people, but I don't know them personally.

Q. By Mr. Townsend: The question is: That you don't know whether or not there were one janitor or 10 janitors in that area about that same hour of the morning, other than Mr. Kelley, do you? A. Only what I saw.

Q. They could have been there without you seeing them, I take it? A. Yes; they could have." [Rep. Tr. pp. 37 to 40.]

Roy Kinny was sworn as a witness for the Government. It was stipulated by counsel that he would testify as follows:

"That all the custodial laborers, including Mr. Kelley, were instructed that they were not to touch mail at any of the places where mail was customarily put or kept. He will also testify that if they found any mail or packages on the floor, or any places where mail did not belong,

they were to pick it up and put it on any of the tables or racks that were around there; and that if they found any money, they were to put it in a specific place that was maintained in which money should be put; that Kelley's particular duties were to sweep all areas, including the cleaning of the sack racks; that the instructions with regard to the handling of mail was contingent upon his knowledge that it was mail." [Rep. Tr. p. 167.]

It was also stipulated that:

"Mr. Kinny will testify that he was the supervisor of the custodial laborers and on that morning he assigned the custodial laborers to their various duties on the third floor; and he assigned Mr. Kelley to sweep the particular area concerning which all this discussion has been had." [Rep. Tr. p. 168, lines 17-22.]

The defendant Kelley testified as follows:

"I live at 1353 West 36th Street with my wife and have lived there for 25 years; have been employed in the United States Post Office for about 7 years. Prior to the time of my arrest I had never had any trouble or difficulty in connection with my employment. On the 21st day of December I worked. I worked on that morning. [Rep. Tr. pp. 176 and 177.] Punched in at 5:00 o'clock. Punched out at 5:30. Mr. Kinny is my foreman. There is an incinerator room down in that basement—just a sorting room down there where we put trash before we burn it. There is a man kept there by full time assignment in that assorting room. He is not classed as a custodian. He is classed as a postal mail handler. The purpose of his being there, the general function is, looking for mail that is lost in the tubs. On the morning of

December 21st I was assigned on the third floor on the west end of the building. It takes in three aisles, approximately about 60 feet and 150 feet deep—I mean 250 feet. Mr. Kinny has been my foreman ever since I have been there. I keep my tools down in the basement. I went by my tub where I keep my tools and carried my tools up with me. I have a box down there with rollers on it and I keep my tools in it. We are assigned the tools as well as duties. You pick up any hamper as long as it is an old one. They don't allow us to put rubbish or trash in one of the new tubs. Before we carry trash down there we put the trash in the hamper. Our instructions with regard to disposing of the hamper after we fill it up are to take it down to the basement. You don't carry it to the incinerator at all. You carry it to the assorting room. That is our specific instruction. I started sweeping in the northwest corner of the building. Swept south. The way the building is laid out, we start in the northwest corner and sweep it out to the center aisle. Then we go into the middle section and sweep it out to the center aisle. And then we come back and sweep it right on down to where we pick up our trash. I did sweep under the racks. The racks stand on little dollies, some of them, about four or five inches high from the floor. The rack itself sets on the rollers. I have a straight broom but I couldn't use it on pushing trash. That is to get in cracks where I can't get in with my push broom, just wherever that comes convenient for me to work with. I sweep the floor with a push broom. If we get some bulky trash we just reach down with our hands and pick it up. That particular morning I swept my trash all the way across the building. I did not take any notice to any mail of any kind that I observed to be

mail, because I didn't see any packages on the truck, because when I was sweeping we shove the trucks around to make room to get around so we can clean. A package could have been laying on the truck and had been shaken off by pushing the trucks around. Shortly after I had gone onto the assignment Mr. Kinny came up; this was before Mr. French and Mr. Franzen came up there. When Mr. French came up and called me. He called me and said, 'Kelley'? I said, 'Yes.' He says, 'Come here.' Down in the southwest corner, near the end of that particular Pico section of the building, I did not at any time notice any particular package that I took to be mail or that you knew was mail or that looked to me particularly like mail. These intervening racks are racks about two feet wide and about five or six feet long and about 18 to 30 inches high from the ground. And that particular rack I saw was piled up with packages, magazines and papers. I shoved it around to one side. Some mail fell off and I left it laying there. I did not throw any mail that I saw and knew to be mail in the trash pile. I never paid any attention to the trash until Mr. French and Kinny and Whitey—we always call the superintendent over there 'Whitey' because all we knew him by was 'Whitey.' At no time did I take any notice of any part of what my trash consisted of. Not for mail I didn't. I just picked it up and threw it in the hamper. Pick it up in the dust pan. At that particular time the dust pan was up at the other end. I just picked it up with my hands. The paper was heavy. This dust pan

was about middle ways of the building. It was not in my hamper at all. Therefore, at this particular time I took all the trash up with my hands. Picked up all the biggest trash. I did not notice any address on it to anybody. I have never been called into the office at any time during the seven years about their losing or mishandling of the mail or anything else that was mail. I have never been called in for putting mail in the trash hamper before. When Mr. French came over in the section where I was he called me. He says, 'Kelley?' I says, 'Yes.' He says, 'Come here.' I walked over to him and he says, 'What did you do with those two packages that you picked up a while ago?' I says, 'I never picked up any packages.' He said, 'Oh, yes; you did.' He said, 'Myself and Mr. So and So saw you.' He called 'Whitey' by his name. He said, 'Whitey laid down the packages there for the purpose of your picking them up.' I said, 'I didn't pick up any packages.' And by that time Kinny and Whitey came along together. Kinny came along there and said, 'What the hell is the matter?' I says, 'I don't know. He claims I picked up some mail here. I didn't do it.' And by that time Whitey goes over in the center and gets my tub and brings it over there and turned the tub upside down and we all looked through the trash. I helped them to look through the trash, and we found those two packages in there. And he said—Mr. French says, 'Here is a wrapper for one of the packages.' ” [Rep. Tr. pp. 178-191.]

Cross-examination: "On this particular morning I did sweep off sack racks in Pico Heights Station area. I swept the floor of the sack racks in the Pico Heights area on that morning. I swept all the racks that had floors on them. I testified that when I was down in this Section E area I pushed around a full table that was loaded with mail and things and some fell off. I just pushed a corner of it around; yes. I don't know how much fell off. I did not pick them up. Oh, there has been packages put in my tub and said I put them in, but I didn't put them in there. One morning a package was found in my tub. I called Mr. Kinny's attention to it and told him I didn't do it. That is the only occasion I can remember. I do not remember when that was, but I called Mr. Kinny's attention to it." [Rep. Tr. pp. 191 to 194.]

No. 11557.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WILLIAM GATHER KELLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

JAMES M. CARTER,

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No. 11557.

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WILLIAM GATHER KELLEY,

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vs.

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Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellant was indicted under Section 318 of Title 18 of the United States Code. The District Court had jurisdiction of the cause under Section 24 of the Judicial Code [28 U. S. C. 41(2)]. The offenses charged were committed in the City of Los Angeles [R. 17].¹ Judgment was entered on February 10, 1947 [R. 7-8]. Motion for a new trial was denied on February 17, 1947 [R. 10-11]. Notice of appeal was filed on February 18, 1947 [R. 12-14]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

¹The references preceded by the symbol "R" are to the pages of the printed record on appeal.

Statute Involved.

Section 318 of Title 18 of the United States Code provides:

“Whoever, being a postmaster or other person employed in any department of the Postal Service, shall unlawfully detain, delay, or open any letter, postal card, package, bag or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the Postal Service, or forwarded through or delivered from any post office or station thereof established by authority of the Postmaster General; or shall secrete, embezzle, or destroy any such letter, postal card, package, bag, or mail; or shall steal, abstract, or remove from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than \$500, or imprisoned not more than five years, or both.”

Statement of the Case.

An indictment in two counts was returned by the Grand Jury, in the September, 1946, Term, and filed in the United States District Court for the Southern District of California, Central Division, charging appellant with violation of Section 318 of Title 18 of the United States Code [R. 2-3]. Count One charged that appellant, employed as custodial laborer by the United States Postal Service in the Los Angeles, California, Post Office, secreted and embezzled a package which came into his possession as such laborer and was intended to be conveyed

by mail [R. 2]. Count Two in similar language charged appellant with unlawfully detaining, delaying and opening a different package [R. 3].

Appellant pleaded not guilty [R. 3], and waived trial by jury [R. 4]. Appellant was tried on January 31, 1947, and found guilty by the court on both counts [R. 5-6].

On February 10, 1947, appellant was sentenced to two years' imprisonment on Count One, and sentence on Count Two was suspended and appellant placed on probation on condition he pay a fine of \$500 and comply with the rules of the Probation Officer [R. 7-8].

Statement of Facts.

Appellant was employed as a custodial laborer by the United States Post Office Department [R. 152, 144-145]. Packages were disappearing in the areas in which appellant worked [R. 107]. On December 21, 1946, appellant was assigned to sweep and clean the southwest end of the third floor of the Terminal Annex Building in Los Angeles [R. 154, 145-146, 17-18], starting at 5 A. M. [R. 154; 65].

Postal inspectors had prepared two test packages [R. 60, 111]. Both bore cancelled postage stamps, and the names and actual addresses of living persons as addressees and senders [Gov. Exs. 2, 3; R. 18-19, 113-114]. Shortly after 5 A. M., on December 21, 1946, both packages were placed in the area appellant was to clean. One [Gov. Ex. 2] was put on the floor of a sack rack at the place on the third floor known as the "Pico Heights Sta-

tion," where papers and small packages for Pico Heights were worked [R. 22, 61, 64]. A sack rack is a metal rack on which mail bags are hung, and has a wooden floor under the bags about a foot off the floor, and is moveable [R. 23, 69]. The other package [Gov. Exs. 3 and 4] was placed on a tray in the circular and small package distribution section of Station E [R. 23, 61, 64]. The tray was on casters, and was used to hold mail, which would be taken out of it as it was moved to different stations [R. 24].

At about 5:30 A. M. appellant reached the sack rack in the Pico Heights Station, picked up the package from the sack rack, turned and tossed it about three feet onto his pile of sweepings, covered it up with two baskets of waste paper, and swept it away [R. 68-69, 141-142].

At about 6:00 A. M. the trash hamper that appellant had been using to collect his sweepings was examined [R. 27-31]. A trash hamper is a canvas tub on casters in which janitors collect their trash before taking it to the basement [R. 25, 75]. Both packages were found in the hamper [R. 163, 30-31, 55, 86-87]. The package which had been placed on the tray at Station E had been unwrapped, and the paper was found separate from the package [R. 33, 60-61, 87]. Appellant had been previously observed bending over his trash hamper for a period of about one-half minute, moving his hands around in it [R. 143, 75, 79, 130-131]. This opened package is referred to in Count Two of the indictment [R. 3, 19-20, 23]. The package picked up and thrown by appellant

into his trash is referred to in Count One [R. 2, 18, 22-23, 68-69].

Appellant had been instructed by his superior that he was not to touch mail at any of the places where mail was customarily put or kept, but that if he found any mail or packages on the floor or where it did not belong, he was to pick it up and put it on any of the tables and racks around there [R. 144].

On a prior occasion in June or July of 1946, appellant had swept away a package of between three and five pounds of butter, bearing stamps and an address on it, and the package was found in his hamper [R. 167-168]. On that occasion appellant was warned not to put anything in his hamper with stamps on it [R. 168].

Summary of Argument.

The packages here involved were “intended to be conveyed by mail” within the meaning of the statute even though they were “test” packages.

The evidence is clear that appellant secreted, detained, and delayed the packages here involved and took them into his possession.

The indictment was sufficient though it did not name the sender or state that the sender intended the packages to be conveyed by mail, and though it did not aver the ownership of the property in the packages, or that they were taken with felonious intent.

I.

That the Packages Were "Intended to Be Conveyed by Mail" Was Properly Alleged and Proven.

Appellant's principal attack is on the "test" packages. Appellant states that the evidence shows that the packages were not to be delivered to the addressees, and were not so delivered, so that they were not "intended to be conveyed by mail" within the statute (A. B. 7-12).² Appellant further argues that the indictment is insufficient for failure to name the sender, and for failure to allege that the sender intended the packages to be conveyed by mail (A. B. 14). Since these raise similar questions they will be discussed together.

The law has long been settled that the mere fact that a package is a decoy addressed to a fictitious addressee and hence undeliverable, does not prevent it from being "intended to be conveyed by mail" within the statute. Thus in *Goode v. United States*, 159 U. S. 663 (1895), a post office inspector caused an envelope which had been specially prepared and cancelled for the occasion to be placed directly in the box of the defendant letter carrier, thus bypassing the usual mailing and sorting process through which a regular letter would pass. The addressee of the letter was a fictitious person. The address, 153 Ziegler St., was also fictitious, but even if it were real, it was not on defendant's route, which only ran up to 51 Ziegler

²References preceded by the symbol "A. B." are to the pages of Appellant's Opening Brief.

Street, so that defendant carrier's duty was to place it in the "list box," where off route letters were put. The court held that this was a "letter" within the statute (159 U. S. 669-670). This decision was followed in *Montgomery v. United States*, 162 U. S. 410 (1896), despite defendant's contention that there was a variance between the indictment, which alleged that the letters were to be conveyed by mail, and the proof, which was that the postal inspectors intended to intercept and withdraw the decoy letters before they reached their destination (162 U. S. 411).

In *Scott v. United States*, 172 U. S. 343, 347, 348-350 (1899), defendant requested the court to charge:

" 'That a letter with an impossible address, which can never be delivered and which the sender, acting conjointly with post office officials, determined should be intercepted in the mail, is not such a letter as was, in the meaning of the statute, 'intended to be conveyed by mail.' "

The Supreme Court held that the refusal to so charge was proper, relying on the two prior Supreme Court decisions.

This has been followed in this circuit in *Jarrett v. United States*, 92 F. (2d) 698 (C. C. A. 9, 1937). In that case a decoy letter was prepared in the Los Angeles office so that it appeared to have arrived there from London. It was addressed to a fictitious person in Holly-

wood, and was placed on a table in the post office where mail was laid out. This Court said:

“The question is: Was this letter, which was addressed to a fictitious addressee, and falsely purporting to be mailed in England, and received in San Francisco and Los Angeles, a letter which was ‘intended to be conveyed by mail,’ within the meaning of the statute?

“The answer should be in the affirmative. The letter was intended to be conveyed by mail. It was contemplated that it should go through the regular channels in the post office, from the registry room to the customs division and back again. This is as much conveyance by mail as the carrying of a letter from one city to another. The intent to have the letter conveyed by mail is none the less effective because the addressee and the purported point of origin are fictitious.”

To the same effect is *McShann v. United States*, 231 Fed. 923, 925-926 (C. C. A. 8, 1916).

The evidence is that the packages were prepared by the postal inspectors, addressed to live persons at real addresses, and bearing cancelled postage stamps [R. 60, 111, 18-19, 113-114]. One was then placed at the spot on the third floor where papers and small packages for Pico Heights were worked [R. 22, 61, 64], and the other in the circular and small package distribution section of Station E [R. 23, 61, 64]. As *Goode v. United States*, 159 U. S. 663, 665 (1895), indicates, the mere fact that the stamps were cancelled before the test packages were put out did not prevent the packages from being mail.

And as *Jarrett v. United States*, 92 F. (2d) 698 (C. C. A. 9, 1937) indicates, the mere intent that the test packages pass through a part of the post office in the regular routine is sufficient to satisfy the requirement that they be "intended to be conveyed by mail." The case makes it clear, as do all test package cases, that an intent that the mail be delivered to the ultimate addressee is not necessary. Here the packages were placed where packages were worked, and there is no evidence whatever that they were to be withdrawn from the mail at any time. In fact, the inspector indicated that, although the prime purpose was to discover who was stealing the mail, if the packages were not stolen they would have reached the addressees. A purpose was to see if they would reach the addressees [R. 113]. This is clearly sufficient under the statute.

Appellant's argument that the fact that these were decoy packages indicates that they were not intended to be conveyed by mail, is thus clearly not supported in law.

If, as these cases indicate, decoy packages with fictitious senders and addressees and which are to be intercepted before their delivery, are proper, it is apparent that an indictment need not name the sender, nor allege that the sender intended that the package be conveyed by mail to the person addressed. There would be no point in naming a fictitious sender, and such a fiction could hardly have any intent.

Appellant's objections to the decoy packages, and the failure of the indictment to specify the sender and the sender's intention, are without merit.

II.

The Evidence Is Clear That Appellant Secreted, Detained, Delayed and Opened the Packages.

Appellant also argues that even if appellant "had tossed the packages into his trash he would not have taken them out of the custodial custody of the Post Office or out of the mail" (A. B. 12), primarily because the Post Office operated a screening procedure in the basement for sorting mail out of the trash before the trash was burned [R. 135; A. B. 13]. Certainly appellant would not be guilty if he unintentionally swept up two packages in his trash, but such is not the case here. Two decoys were put out, and both were found in his hamper. He had been seen to pick up one and throw it into his trash [R. 68-69, 141-142], which he swept into his hamper. He had been seen to be bending over the hamper, working his hands in it [R. 143, 79, 75, 130-131], and one of the packages was found in his hamper opened [R. 33, 60-61, 87]. It is apparent that appellant diverted both packages into his trash, planning to open them at some time between sweeping them up and taking the trash from the third floor down to the incinerator and screening room in the basement. He succeeded in getting the wrapping off of one. From this the court could, and did, find that he secreted and embezzled the unopened package, and detained, delayed, and opened the opened package.³

³Appellant, in an "Appendix" to its brief, presents its summary of the evidence. That summary is plainly insufficient. The testimony alone in this case covers over 150 pages of the record on appeal [R. 17-174]. Moreover, the appellate court, of course, does not weigh evidence or determine the credibility of witnesses, and the finding of the lower court will be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser v. United States*, 315 U. S. 60, 80 (1942).

It has long been settled that a package need not be taken out of the post office building before this crime is committed. *United States v. Marselis*, Fed. Cas. No. 15,724, 2 Blatchf. 108 (C. C., S. D. N. Y., 1849); *United States v. Nott*, Fed. Cas. No. 15,900, 1 McLean 499 (C. C. Ohio, 1839). Furtively and feloniously removing it from the place where it belongs, is sufficient.

III.

The Indictment Contains All the Elements of the Crime.

Appellant also attacks the indictment for failure to allege that the property embezzled belonged to someone other than defendant, or that there was a taking with wrongful or felonious intent (A. B. 15).

In prosecutions under the section here involved it is not necessary to allege in the indictment or to prove at the trial all the essential ingredients of the crime of larceny. See *Thompson v. United States*, 202 Fed. 401, 405 (C. C. A. 9, 1913); *United States v. Jolly*, 37 Fed. 108, 110-111 (D. C., W. D. Tenn., 1888). This is so because the gist of the offense is the breach of trust as to the mail. The statute is designed to protect the United States mails, not merely to punish thefts. The fact that the letter involved is addressed to someone other than the defendant shows a breach of trust.

Hence, it is not necessary to allege who is the owner of the letters or their contents. *United States v. Laws*, Fed. Cas. No. 15,579, 2 Lowell 115 (D. C. Mass., 1872);

United States v. Okie, Fed. Cas. 15,916, 5 Blatch. 516 (C. C., S. D. N. Y., 1867); *United States v. Baugh*, 1 Fed. 784, 788-789 (C. C., E. D. Va., 1880); *Walster v. United States*, 42 Fed 891, 893 (C. C., N. D. N. Y., 1890).⁴

Nor is it necessary to allege that the taking was done with felonious intent. The language of the statute is sufficient. *United States v. Atkinson*, 34 Fed. 316 (D. C., E. D. Mich., 1888).⁵

Count One alleged that appellant did "secrete and embezzle," and Count Two that he did "unlawfully detain, delay, and open." This language sufficiently alleged the crimes charged.

⁴The same result has been reached under the companion statute (18 U. S. C. 317) covering secretion and embezzlement from the mail by anyone: *United States v. Trosper*, 127 Fed. 476 (D. C., S. D. Calif., 1904); *United States v. Falkenhainer*, 21 Fed. 624, 627 (C. C., E. D. Mo., 1884); *Bowers v. United States*, 148 Fed. 379 (C. C. A. 8, 1906); *Poffenbarger v. United States*, 20 F. (2d) 42, 44 (C. C. A. 8, 1927); *Collins v. United States*, 20 F. (2d) 574, 575 (C. C. A. 8, 1927).

⁵No allegation of felonious intent is necessary under R. S. 5469 (18 U. S. C. 317) covering stealing and embezzling mail by persons not employed in the Post Office. *United States v. Trosper*, 127 Fed. 476 (D. C., S. D. Calif., 1904); *United States v. Falkenhainer*, 21 Fed. 624, 627 (C. C., E. D. Mo., 1884).

Conclusion.

The objections raised by appellant are without merit. There can be a conviction based on test packages. The evidence sustains the conviction, and the indictment is sufficient. The conviction should be affirmed.

Respectfully submitted,

JAMES M. CARTER,

United States Attorney;

ERNEST A. TOLIN,

Assistant U. S. Attorney;

WILLIAM STRONG,

Assistant U. S. Attorney;

PAUL FITTING,

Assistant U. S. Attorney,

Attorneys for Appellee.

No. 11561

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHERN TRUCK LINE, INC.,
a corporation,

Appellant,

vs.

EARL DUNN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Alaska, Third Division

FILED
JUN - 7 1947

PAUL F. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

GEORGE B. GRIGSBY,

Anchorage, Alaska.

Attorney for Northern Truck Lines, Inc.,
Defendant and Appellant.

J. L. McCARREY, JR.,

Anchorage, Alaska.

Attorney for Earl Dunn,
Plaintiff and Appellee.

In the District Court for the Territory of Alaska,
Third Division

No. A-3936

EARL DUNN,

Plaintiff,

vs.

NORTHERN TRUCK LINE, INC.,

Defendant.

COMPLAINT

Comes now Earl Dunn, the above named plaintiff, and complains and alleges against the defendant as follows:

I.

That the defendant, Northern Truck Line, Inc., is now, and at all times mentioned herein was, a corporation existing under and by virtue of the laws of the State of North Dakota and doing business within the Territory of Alaska.

II.

That between the 1st day of January, 1944, and the 15th day of May, 1944, plaintiff, at the special instance and request of the defendant, and for the benefit of the defendant, negotiated certain hauling contracts with the Civil Aeronautics Administration of the United States of America, at Anchorage, Alaska, and furnished certain money, labor, equipment and supplies in procuring such contracts.

III.

That the defendant agreed to pay the plaintiff for his work, labor and for the payment of money, materials, equipment and supplies furnished by the plaintiff in the negotiation of such contracts; that the sum of \$1,500.00 is the reasonable value of the plaintiff's services, and of the money advanced, and equipment and supplies furnished by the plaintiff in negotiating the said contracts on behalf of the defendant with the Civil Aeronautics Administration of the United States of America. [1*]

IV.

That as plaintiff is informed and believes and so alleges the fact to be, the defendant received the gross sum of \$55,425.48, for hauling performed by the defendant from the Civil Aeronautics Administration, and that by reason of the plaintiff's services, and of the money advanced, and equipment and supplies furnished by the plaintiff, in negotiating the said contracts, the plaintiff became entitled to the sum of \$1,500.00 from the defendant.

V.

That plaintiff has repeatedly requested payment of the amount due to him from the defendant as hereinabove mentioned, but that no part of the same has been paid and that there is now due and owing to the plaintiff from the defendant the sum of \$1,500.00, together with interest on that sum at the rate of six (6) per cent per annum from the 1st day of January, 1945.

* Page numbering appearing at foot of page of original certified Transcript of Record.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$1,500.00, together with interest on that sum at the rate of six (6) per cent per annum from the 1st day of January, 1945, together with plaintiff's costs and disbursements in this action incurred and for such other and further relief as to the Court may seem equitable and just.

/s/ J. L. McCARREY,, JR.

Attorney for Plaintiff.

United States of America,
Territory of Alaska—ss.

Earl Dunn, being first duly sworn, upon his oath, deposes and says:

That he is the plaintiff in the above and foregoing action, that he has read said complaint, knows the contents thereof, and believes the same to be true.

/s/ EARL DUNN.

Subscribed and Sworn to before me this 20th day of October, 1945.

[Notary Seal] /s/ J. L. McCARREY, JR.,
Notary Public in and for the Territory of Alaska.

My commission expires: 6/10/46.

[Endorsed]: Filed Oct. 22, 1945. [2]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant in the above entitled action, and answering the Complaint of the plaintiff filed herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of plaintiff's Complaint.

II.

Denies each and every allegation contained in Paragraph II of plaintiff's Complaint and the whole thereof.

III.

Denies each and every allegation contained in Paragraph III of plaintiff's Complaint and the whole thereof.

IV.

Denies each and every allegation contained in Paragraph IV of plaintiff's Complaint and the whole thereof, except that defendants admits it received approximately the sum of Fifty-Five Thousand, Four Hundred Twenty-Five and 48/100 Dollars (\$55,425.48) from the Civil Aeronautics Administration for hauling performed by the defendant.

V.

Denies each and every allegation contained in Paragraph V of plaintiff's Complaint and the whole thereof. [3]

Wherefore, defendant prays that said action be dismissed and for its costs and disbursements herein.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

United States of America,
Territory of Alaska—ss.

Chris Haugen, being first duly sworn, deposes and says: That he is an officer and the managing agent of the defendant in the above entitled action; that he has read the foregoing Answer and knows the contents thereof, and that the same is true as he verily believes.

/s/ CHRIS HAUGEN.

Subscribed and sworn to before me this 23rd day of October, 1945.

[Seal] /s/ GEORGE B. GRIGSBY,
Notary Public for Alaska.

My Commission Expires: May 14, 1947.

Service admitted this 23rd day of October, 1945.

/s/ J. L. McCARREY, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 23, 1945. [4]

[Title of District Court and Cause.]

MEMORANDUM OF EXCEPTIONS

At the conclusion of the reading of the instructions to the jury in open court in the above entitled case, the following proceedings were had in the presence of the jury, but not in the hearing of the jury:

Court: The plaintiff has the first right to except.
Mr. McCarrey: I have no exceptions.

Court: All right, Mr. Grigsby. I have inserted the word "all" on page 1.

Mr. Grigsby: I except to Instruction No. 3 on the ground that it fails to contemplate the defense in this case, which was that any activities engaged in by the plaintiff with reference to negotiating these contracts was to be compensated for by the employment of the plaintiff and his trucks in the performance of the contract. I except to this part of the instruction as follows:

“To justify a verdict for the plaintiff it is incumbent upon the plaintiff to prove, by such preponderance of the evidence, the material averments of his complaint, namely, that during, or about, the time mentioned and at the special instance and request of the defendant, and for the benefit of the defendant, the plaintiff performed the services and furnished the money, labor equipment and supplies of the reasonable value of \$1500; that plaintiff has demanded of defendant payment of said sum and defendant has failed and refused to pay the same or any part thereof. If the plaintiff has proved each and all of the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict should be for the plaintiff.”

Now, we object to that instruction on the ground that all of the conditions set forth in Instruction 3 might have been compiled with—the services might have been performed at the request of the defendant, and they [5] might have been of the value of \$1500, and demand might have been made—but pay-

ment might have been according to the contention of the defendant; the consideration might have been the employment of the plaintiff's trucks on the project, and the instruction fails to contemplate that.

Court: Exception will be noted as of course.

Mr. Grigsby: We except to 3-B on the same ground, that it fails to contemplate the defense of the defendant that all compensation to the plaintiff for any connection he had with securing the contracts was to be received by employment of his trucks. You have changed \$75,000 to \$55,000?

Court: Yes, I have.

Mr. Grigsby: Now, your Honor, the complaint alleges that the Northern Truck Line was paid \$55,000 odd gross. This instruction would lead the jury to believe that they made a profit of \$55,000. It is in evidence, I think, the profit was about \$6,000 or \$7,000.

Court: No, it is in evidence that the total they received was fifty-four thousand and some.

Mr. Grigsby: The profit on that was approximately \$6,000.

Court: I can correct that.

Mr. McCarrey: It is not in evidence that it was \$54,000.

Mr. Grigsby: Well, the complaint alleges gross and I don't think it would be fair to have it go to the jury that they made a profit of \$54,000.

Court: Quite right. We don't want to deceive the jury. I will clarify the language by inserting the word "gross". I will say "the gross sum."

Mr. Grigsby: I think that is all.

Court: Exceptions will be noted as of course.

(The court then read to the jury the corrections made in Instruction 3-B.)

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed May 28, 1946. [6]

In the District Court for the Territory of Alaska,
Third Division, Anchorage Precinct

No. A-3036

EARL DUNN,

Plaintiff,

vs.

NORTHERN TRUCK LINES, INC.,

Defendant.

JUDGMENT

This cause coming on for trial before the Court and the jury on the 16th and 17th days of May, 1946, and the plaintiff, Earl Dunn, appearing by his attorney, J. L. McCarrey, Jr., and the defendant appearing by its attorney, George B. Grigsby, and the issues having been duly tried, and the jury having rendered a verdict for the plaintiff in the sum of \$1,500.00 and interest in the sum of \$7.50;

It Is Hereby Ordered, Adjudged and Decreed by the Court that the plaintiff have and recover of the defendant the sum of \$1,500.00, with interest at the

rate of six per cent from the 17th day of May, 1946, in the sum of \$7.50, the amount in the aggregate being \$1,507.50; and that the plaintiff have execution thereon.

Dated at Anchorage, Alaska, this 11th day of June, 1946.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed June 11, 1946. [7]

[Title of District Court and Cause.]

PETITION FOR APPEAL

The above-named defendant, conceiving itself aggrieved by the judgment made and entered on the 11th day of June, 1946, in the above entitled cause, does hereby appeal from the said judgment to the United States Circuit Court of Appeal for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and said defendant prays that this appeal may be allowed, that a citation may issue according to law, and that a transcript of the record, proceedings and documents upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioner further prays that a supersedeas may be granted pending the final disposition of this cause, and that the amount of surety may be fixed by the order allowing the appeal.

Dated at Anchorage, Alaska, June 14th, 1946.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

Service accepted June 14th, 1946.

/s/ J. L. McCARREY, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed June 13, 1946. [8]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes the defendant and appellant herein and files the following assignments or error upon which it will rely in the prosecution of its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment made and entered in this cause on the 11th day of June, 1946, by the above entitled court, as follows, to-wit:

I.

That the court erred in overruling the motion of the defendant, made at the conclusion of the evidence, that the court direct the jury to return a verdict for the defendant, said motion being based upon the ground that there was insufficient evidence to submit to the jury to justify a verdict for plaintiff, to which ruling defendant excepted and the exception was allowed.

II.

That the court erred in overruling the motion of the defendant for a new trial based upon the ground

that there was insufficient evidence to submit to the jury to justify the verdict for plaintiff.

III.

That the court erred in instructing the jury as follows:

“To justify a verdict for the plaintiff it is incumbent upon the plaintiff to prove, by such preponderance of the evidence, the material averments of his complaint, namely, that during, or about, the time mentioned and at the special instance and request of the defendant, and for the benefit of the defendant, the plaintiff performed the services and furnished the money, labor, equipment and supplies of the reasonable value of \$1500; that plaintiff has demanded of defendant payment of said sum and defendant has [9] failed and refused to pay the same or any part thereof. If the plaintiff has proved each and all of the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict should be for the plaintiff.”,

to which instruction defendant duly excepted and the exception was allowed.

III.

That the court erred in instructing the jury as follows:

“The plaintiff has offered testimony to the effect that plaintiff entered into an oral agreement with the defendant, the latter acting by and through the witness Chris Haugen, wherein it was agreed that

plaintiff and Haugen should come to Alaska and there seek to obtain trucking contracts for the defendants corporation and that the plaintiff and defendant should share equally in the profits of any contract so obtained; that pursuant to said agreement the defendant secured the contracts which have been introduced in evidence in the trial of this case as Plaintiff's Exhibits Numbers 3 and 4, under which defendant received for the services rendered the gross sum approximating \$55,000.00; that the defendant through its president, denied the validity of said contract and refused to acknowledge it in any way; that plaintiff thereafter brought this action to recover the reasonable value of his services and for money advanced and equipment and supplies furnished by the plaintiff in negotiating said contracts. You are the sole judges of the weight and value of such evidence as well as of other evidence admitted in the trial.

In this connection, you are instructed that if the plaintiff's testimony concerning said oral agreement, and the performance of said agreement on his part and the subsequent rejection and denial of the validity of such agreement by the defendant is true, then the plaintiff is by law entitled to recover from the defendant the reasonable value of his services as well as of any money, material or equipment expended or furnished by the plaintiff in negotiating the said contracts. The fact, if it be a fact, that the original agreement as claimed by the plaintiff, was in the nature of a partnership would not preclude the plaintiff from recovering compensation for the reasonable [10] value of his services and of equip-

ment and supplies furnished by plaintiff and money advanced by plaintiff in carrying out said agreement according to his understanding of its terms.”, to which instruction defendant duly excepted and the exception was allowed.

Wherefore defendant and appellant prays that the judgment in the above entitled cause be reversed and the cause remanded, with instructions to the trial court as to further proceedings therein and for such other and further relief as may be just in the premises.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant and
Appellant.

Service admitted June 14th, 1946.

/s/ J. L. McCARREY, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed June 13, 1946. [11]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL
AND SUPERSEDEAS

The petition of the Northern Truck Line, Inc., defendant in the above entitled action, for an appeal from the final judgment rendered therein, is hereby granted and the appeal is allowed, and upon petitioner filing a bond in the sum Two Thousand Dollars (\$2000.00) with sufficient sureties and conditioned as required by law, the same shall operate as a supersedeas of the judgment made and entered

in the above cause and shall suspend and stay all further proceeding in this court until the termination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

/s/ ANTHONY J. DIMOND,
District Judge.

Dated June 14th, 1946.

[Endorsed]: Filed June 13, 1946. [12]

[Title of District Court and Cause.]

CITATION ON APPEAL

To the plaintiff, Earl Dunn and his attorney, J.
L. McCarrey Jr.:

You and each of you are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California, forty (40) days from the date of this citation, pursuant to the order allowing appeal on file in the office of the Clerk of the District Court for the Territory of Alaska, Third Division, in that certain action pending in said District Court, entitled, "Earl Dunn, plaintiff, vs. Northern Truck Line, Inc., defendant," being No. A-3936 in the files of said District Court. and wherein the Northern Truck Line, Inc., is appellant and Earl Dunn is appellee, to show cause, if any there be, why the judgment rendered against said Northern Truck Line, Inc., should not be corrected and why speedy justice should not be done to the parties in the premises and in that behalf.

Witness the Honorable Anthony J. Dimond, District Judge for the Territory of Alaska, Third Division, this 14th day of June, 1946, and of the Independence of the United States the 171st.

/s/ ANTHONY J. DIMOND,
Judge.

Service admitted June 14th, 1946.

/s/ J. L. McCARREY, JR.,
Attorney for Defendant and
Appellee.

[Endorsed]: Filed June 13, 1946. [13]

[Title of District Court and Cause.]

PROPOSED BILL OF EXCEPTIONS

Be It Remembered:

That this cause came on for trial before the above entitled court, sitting at Anchorage, Alaska, on the 15th day of May, 1946, the plaintiff appearing in person and by his attorney, J. L. McCarrey, Jr., the defendant appearing in person and by its attorney George B. Grigsby, and the following proceedings were had: A jury having been duly impaneled and sworn:

MARSHALL HOPPIN

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination

My names is Marshall C. Hoppin. I live at 1246

(Testimony of Marshall Hoppin.)

Eighth Avenue, Anchorage, Alaska. I have lived in Anchorage seven years. In the year 1944, I was Regional Manager of the Civil Aeronautics Administration. I know Mr. Dunn. I met Mr. Dunn in '44, as I recall it, in the early spring. I happened to be working in my garden on Sunday and two gentlemen drove by in a car marked with an Alberta license. They stopped at the corner of Eighth and M and they called to me and asked if I could direct them to Bootleggers Cove Road. So they backed up and I said: "I noticed you have a Canadian license on your car." Mr. Dunn was driving the car and Mr. Haugen was his companion. So I asked them, how did they enjoy their trip over the Highway. They both indicated they had a very fine trip and they had been working on the Highway as trucking contractors. [14]

During our course of conversation I asked them, well, what was their purpose in coming into Anchorage, and Mr. Dunn indicated that they intended to establish a trucking business if there was any business to be had in Alaska.

At that time, the Civil Aeronautics Administration was very much interested in moving materials over the Richardson Highway from Valdez to our respective stations on the Richardson Highway—Gulkana and Big Delta—as well as movement of materials from Fairbanks to Big Delta, Tanacross and Northway. So I was naturally interested in knowing what these gentlemen may be doing and in organizing a new trucking company. They in-

(Testimony of Marshall Hoppin.)

licated that they had been in business on the Highway somewhere in Canada, so I requested that they come in to see my in my office at their convenience.

Several days later Mr. Dunn and Mr. Haugen came in to my office, and we talked generalities first then we got down to talking about equipment, and Mr. Dunn did most of the talking. He indicated that he was either the president or the manager of the operation. Mr. Haugen was the maintenance superintendent as well as dispatcher, we might call him, I would say. I knew nothing of any partnership arrangement with these gentlemen nor about the ownership of the Northern Trucking Lines, but from the official business that we had to do in moving equipment, I was very much interested in a new trucking company as, at that time, the operations of trucking was at a premium and most of it was being taken up by the Army in the movement of their military supplies. So I requested these two gentlemen to contact our contracting service office—Mr. Simonds and Mr. Fowler.

I did not see them again for several days, when again they came into my office and discussed the fact that they had had certain conversations with my contract and service group, and at that time I asked them about the equipment that they had. As I recall it, Mr. Dunn stated that most of their equipment was in North Dakota, but some was on the highway; and Mr. Haugen mentioned the fact that they had ample resources [15] to obtain the equipment necessary to perform almost any type of haul-

(Testimony of Marshall Hoppin.)

ing. And there was a general discussion of what may occur and the amount of tonnage to be handled. I think that was about all at that meeting.

Then a period of time elapsed and Mr. Dunn called me up and asked me if I could aid him in getting a telephone into his home or office. And if you remember during the war we had a pretty difficult time in obtaining telephones. So I said "certainly, I would be happy to call the City Electrician", which I did and told them that this new trucking firm would probably be doing business with the C.A.A. as well as other firms, and could they possibly aid in giving Mr. Dunn a telephone.

And I heard nothing more from them for a period of time, and I understood that there was a contract awarded to the Northern Trucking Company for hauling of certain materials over the highway. I am unable to recall the figures, because those things are details and I did not pay attention to that, but strictly turned that over to the Office Service Division.

My next contact with them was some months later when Mr. Dunn came in and told me he was having some difficulty.

The first time I met Mr. Haugen and Mr. Dunn, as I said, they asked me for directions to Bootleggers Cove. That was in the fall or spring, I believe. I was out in the garden raking leaves—maybe in the fall. It might have been in the spring—it might have been in January. It was either early in the spring or late in the fall. I can't recall the date

(Testimony of Marshall Hoppin.)

exactly. When they inquired the first time how to get out to Bootleggers Cove, Mr. Dunn was driving the car and Mr. Haugen accompanied him. It was not at our first meeting, but when he was in my office, that Mr. Dunn said he was Manager, or some official, in the Northern Truck Line. Mr. Dunn did most of the talking in my presence. He represented himself as being either President or Manager of the Northern Truck Lines, but I saw no credentials of either Mr. Dunn or Mr. Haugen. Mr. Haugen represented himself to be the maintenance man, or dispatcher, as well as a partner, in this conversation.

Cross Examination

By Mr. Grigsby:

I stated in my first answer, that I was working in the garden when I had this conversation with these gentlemen when they drove out in a car. It could have been in the month of January. I could have been working in the garden in the month of January. I would not say it was not in that month. Mr. Dunn did practically all of the talking. On each occasion when I saw them together, Mr. Dunn did most of the talking. They did not, in this first conversation, tell me the name of the company. They said they had come up to Alaska to look for a trucking business. They had been working in the Highway in Canada. I had two or three more conversations with these gentlemen after that, in my office. As I recall it, I had altogether three conversations with both of them. It was a few days

(Testimony of Marshall Hoppin.)

after I met them in front of my house, on Tuesday or Wednesday of the same week, that they came into my office the first time. It was probably two weeks after that when I saw them together the next time. I asked them to come up because I was interested in anybody that had these trucking facilities. They just had a general talk with me about their ability to furnish equipment for the kind of hauling wanted done. There was no conversation about any particular contract, we discussed the movement of freight generally between Valdez and Gulkana, Big Delta, Fairbanks, Tanacross, and Northway. There was no conversation in my office with both of these gentlemen about any particular contract for hauling between any definite points. Some months later, I learned that there had been a contract let to the Northern Truck Line. I had nothing to do with that. It was handled by the Office Service Division. I believe there were bids advertised for in connection with that contract. I do not know of anything that Mr. Dunn had to do with that particular contract. I have been acquainted with Mr. Dunn since then, have seen him on several occasions.

Redirect Examination

By Mr. McCarrey:

In that conversation relative to the trucking of freight, the [17] hauling of freight from Valdez to Gulkana and Northway was discussed. We were interested in the movement of freight. I talked

(Testimony of Marshall Hoppin.)

about the movement of freight up to those points with Mr. Dunn and Mr. Haugen.

Recross Examination

By Mr. Grigsby:

At that time there had been no contract let, nor no bids. There was the possibility of that kind of contract, and thereupon,

MARCUS McDEVETT

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

My names is Marcus McDevett. I live at 807 H Street, have lived in Anchorage since June of '43, except for an interval of five or six months in '44 between May and November. I work for the Morrison-Knudsen Co. I am the Office Manager for the Morrison-Knudson Co., taking care of all office routine. I was so employed in May, 1944. If a contract were let with my organization, I would have knowledge of it, also if any payment were made thereon.

Yes, I can identify the document you have handed me. It is a statement of the payment made by Morrison-Knudsen Co. to the Northern Truck Line for freighting of materials and supplies from Anchorage to Northway. This whole group of instruments represents the business we had on that one transaction with the Northern Truck Line. (Group of

(Testimony of Marcus McDevett.)

papers admitted in evidence and marked Plaintiff's Exhibit No. 1.) The witness continuing:

This exhibit is the contract the Northern Truck Line had with us.

Cross Examination

By Mr. Grigsby:

That contract had nothing to do with hauling of the C.A.A. We were contractors operating under the C.A.A. We had our own camp there at Northway and it was our obligation to get our own supplies from Anchorage or Valdez to Northway. The Morrison-Knudsen Co. had a contract with the C.A.A. for construction of an air base at Northway. In [18] connection with our contract under the C.A.A., it was necessary for us to transport our materials and men and supplies to the job site, and we hired the Northern Truck Line services in that respect. I did not have anything to do with the employment of the Northern Truck Line. Mr. Steelman, who was then General Superintendent for Alaska, negotiated that. I know the agreed price of the contract. I know Mr. Dunn was one of the gentlemen he negotiated with. Mr. Dunn was in the office. I don't recall Mr. Haugen. I did not know any of the internal working of their organization, thereupon,

J. M. FOWLER

called as a witness on behalf of Plaintiff, being first duly sworn, testified as follows:

(Testimony of J. M. Fowler.)

My name is J. M. Fowler. I live at 3rd Avenue and East E, have lived in Anchorage since December '43. My title is Chief of Contract and Procurement Section of the C.A.A. I was employed in a similar position during January of 1944, was working in the Contract Section at that time. I know Mr. Dunn and Mr. Haugen. I met them shortly after they had made their contacts with Mr. Hoppin. That was undoubtedly in the spring of '44. I am not certain of the month. It was in the early part of '44. When they came to see me they were out to get any trucking business they could. We had a conversation with them at that time with reference to trucking. I was in on several conversations with them. Mr. Hoppin always referred matters of that kind direct to our office. We put them on the bidders' list for any future trucking as the Northern Truck Line. They were representing the Northern Truck Line and we dealt with both of them. Both Mr. Haugen and Mr. Dunn represented themselves to be a part of the Northern Truck Lines. I believe there were two contracts let to the Northern Truck Lines that year. These contracts were let out on bid, advertised, and everyone had an equal opportunity, and the contract was awarded to the low bidder. The document you hand me is the bid that was submitted by Northern Truck Lines. That was the bid upon which the contract was awarded, as a result of having been accepted. This is their first quotation, and a [19] formal contract was entered into on the basis of this quotation.

(Testimony of J. M. Fowler.)

(Document admitted in evidence as Plaintiff's Exhibit No. 2.)

Witness continuing: Witness reads from first page of Exhibit No. 2 as follows:

“Bidder ‘Northern Truck Line, incorporated in the State of North Dakota, Anchorage, Alaska’, bid signed by ‘Earl Dunn, General Manager, by Chris Haugen, Managing Director’ ”.

Witness continuing:

The document you hand me is a formal contract that was entered into with the Northern Truck Lines on the basis of their low bid.

(Document admitted in evidence and marked Plaintiff's Exhibit No. 3.)

Witness continuing:

I can not ascertain from that contract how much was paid the Northern Truck Line. I believe that was asked for separately and I think Mr. Chambard brought that down.

(Witness is handed a document and asked to identify it.)

Witness continuing:

This is the other formal contract that was entered into that season as a result of a bid. There were two bids and two contracts, I believe, entered into by the C.A.A. with the Northern Truck Lines, Inc.

(Contract admitted in evidence and marked Plaintiff's Exhibit No. 4.)

(Testimony of J. M. Fowler.)

Witness continuing:

The hauling under this contract was completed. So far as I know, the Northern Truck Line was paid for that. As far as I am concerned, as representative of the contract section of the C.A.A., the contract was completed.

Cross Examination

By Mr. Grigsby:

The date of the contract, Plaintiff's Exhibit No. 4, is June 15th. The contracts are on an estimated basis and so much a ton mile and then the actual orders under that contract are issued from time to time as the hauling is required. This contract was not for the fiscal year 1945 [20] entirely. Exhibit No. 2 was the bid upon which that first contract was let. The bids, as I recall, were both taken about the same time, though they covered different areas. The contract was given to the Northern Truck Line as stated in the contract and also in the bid.

Q. And Mr. Dunn represented to you that he was General Manager of the Northern Truck Line?

Q. Was Mr. Haugen present at the time he made these representations?

A. Of course they were in so many times and we weren't too much concerned until after the actual formal contract was entered into just who they were. They were eligible bidders and we accepted their bid and when the formal contract was entered into, I think Mr. Haugen signed the formal contract.

I do not recall whether this bid was submitted

(Testimony of J. M. Fowler.)

by mail or personally. At that time we were handling them on a negotiated basis. They weren't necessarily sealed bids but I don't recall how they came in. The contract was let specifically as a result of that bid.

Cross Examination

By Mr. Grigsby:

I brought Exhibit No. 2 with me this morning. That is a part of the official files. It was in the custody of my office, has been there all the time since that bid was submitted. No person has had access to it that I know of. When it was originally submitted, I assume it was brought in personally. Most of these truckers did bring them in personally and hand them to the clerk in the office. I wouldn't recollect who did. That is the original bid, on which the contract was let. I think there were two bids by the Northern Truck Line introduced this morning. Not for this job of work that I recall. I don't believe any bids were rejected and readvertised. It is hard to recall the detail of a routine transaction that long ago. As far as I know, this is the only bid on this particular haul. Those forms are available to any qualified person or they are available to the public in general, and a copy is posted in the office. They are available to the public, to anyone interested [21] in the business, and also a copy is posted in the Post Office. They are public bids. Anyone that comes into the Post Office may come up and ask for a form to make a bid. I do not recall who called for that form. You see, we have a

(Testimony of J. M. Fowler.)

bidders' list. If anyone on our bidders' list came up and said he wanted a form and the conditions, we would hand him that. I do not remember to whom, representing the Northern Truck Line, I did hand it to. It was probably mailed out originally. The form was mailed out to what bidders we had on the list and I am sure Northern Truck Lines was on our list at that time. The bidders fills in this part (indicating), and of course this quotation, and any comments he may have.

Q. Well now, is there ever an entry on the bid accepted by the Government?

A. Oh, an informal bid—sometimes we make the contract right—acceptance right on that form.

This is an informal bid and we entered into a formal contract on the basis of that. There is no acceptance. The acceptance is in the contract. We would fill that in on an informal contract but this was a formal contract because a bond was required and it was entered into on a formal contract form, which you have in the other exhibit. This is an informal bid. A formal bid would be a type of form, really, that requires more formality and it is for use in the larger bids. Where there is a performance bond required, we use a standard form.

The length of time after a bid is put in, before we award the contract, varies. On that particular one, you can tell by the form of contract you have there. I have not compared the bids.

Q. May I see the other exhibits?

Well, this contract is Exhibit No. 4, is dated June

(Testimony of J. M. Fowler.)

15th, and Exhibit No. 3 is dated April 15th. Now, on the body of those contracts, they appear to be identical, are they not?

A. One contract is hauling out of Valdez and the other is for hauling out of Anchorage to highway points. [22]

Those are the two contracts and they are tied in with the two informal quotations there.

Q. I notice this contract of April 15th, Exhibit No. 3, is signed by John P. Meadors, President and General Manager of the Northern Truck Line. Did you meet Mr. Meadors?

A. Yes, sir. I don't recall where Mr. Dunn was at that time. I know Mr. Dunn. I have known him since that spring when he first came into the office. I have seen him around. He submitted other bids.

Mr. Grigsby: May I make this witness my witness to save recalling him?

Mr. McCarrey: That is quite all right.

Court: Very well.

Direct Examination

By Mr. Grigsby:

Q. How long have you known Mr. Dunn, the plaintiff? A. Since the spring of 1944.

Q. And in Anchorage? Only? A. Yes.

Q. Do you know what his general reputation has been in Anchorage and vicinity during the time you have known him for truth and veracity?

Mr. McCarrey: In this respect, I object thereto

(Testimony of J. M. Fowler.)

because the attorney has not qualified Mr. Fowler as to being well enough acquainted with him.

Court: That objection is not good, I think, but the witness, Mr. Dunn, hasn't yet testified.

Mr. Grigsby: I asked if I could make him my witness out of order.

Court: Is Mr. Dunn to testify?

Mr. McCarrey: He is.

Court: You may answer.

Q. Just, do you know what his general reputation, in Anchorage and vicinity—what it has been since the time you have known him?

A. We have various stores come to us in an official capacity.

Court: Well, the question is——

Mr. Grigsby: The question is, do you know his general reputation in Anchorage and vicinity?

A. I know what has reached me in my position.

Q. What is that?

A. I know what has reached me in the position I am in.

Q. I didn't hear?

A. No, I say, I know what has reached me in the position I am in at C.A.A.

Q. Well, the question is: Do you know his general reputation? A. Yes, I suppose I do.

Q. Is it good or bad?

A. Well, it is not good.

Mr. Grigsby: That is all.

Mr. McCarrey: I would like to ask a question,

(Testimony of J. M. Fowler.)

if it please the Court. I would like to cross examine on this last.

Court: Yes, you may do so.

Mr. McCarrey: Thank you.

Cross Examination

By Mr. McCarrey:

Q. Mr. Fowler, how has this information come to you, as to Mr. Dunn's veracity?

A. From various other Government agencies and, of course, the truckers, which we always took with a grain of salt from other truckers, but——

Q. That isn't any personal dealings yourself, then? A. No; no, I have no——

Q. Just information that other people passed on to you?

A. Or that we have received in regards to contracting work from other Government agencies.

Mr. McCarrey: Thank you.

If it please the Court, on redirect examination, again, through an inadvertency, I have another bid which I would like to introduce.

Court: You may submit it to the witness for identification.

Redirect Examination

By Mr. McCarrey:

(Witness is handed a document and asked to identify it.)

Witness continuing:

This is a bid by the Northern Truck Line. [24]

Q. And will you please read to the Court and

(Testimony of J. M. Fowler.)

jury by whom that was submitted and by what authority it was alleged to have been the bid of the Northern Truck Line for this contract?

A. This is submitted by Northern Truck Line, Incorporated in the State of North Dakota——

Mr. Grigsby: Don't I get a chance to examine and object?

Mr. McCarrey: Yes, if it please your Honor and Mr. Counsel.

(Mr. McCarrey hands document to Mr. Grigsby.)

Mr. McCarrey: I understood the counsel just disapproved and didn't object to these things.

Mr. Grigsby: May I see that other bid?

Court: Is there objection?

Mr. Grigsby: I would like to ask a question.

Court: You may inquire.

Mr. Grigsby: I will hand you both these bids and as you: Are you familiar with handwriting, generally? You have seen lots of handwriting? Haven't you? A. Well, yes.

Mr. Grigsby: And writing done with pen and ink? A. That's right.

Mr. Grigsby: You have an ordinary acquaintance with handwriting done with ink, by means of a pen?

A. Yes, sir.

Mr. Grigsby: Will you state whether or not the word "Earl Dunn" and the word "Chris Haugen" are written with the same ink?

A. No, that's different ink.

(Testimony of J. M. Fowler.)

Mr. McCarrey: Is counsel wishing to qualify this witness as an expert?

Court: Is there objection?

Mr. McCarrey: Well, if the counsel will qualify him——

Court: Well, never mind that.

Witness: Your Honor, I understand I was subpoenaed down here to bring the official files. I wonder if I am not——

Mr. Grigsby: Not a handwriting expert——

Witness: ——getting questions on things I wasn't brought down here for. [25]

Court: You are required to answer anything relevant within your knowledge, and the Court decides the relevancy. The proffered exhibit may be admitted in evidence and marked Plaintiff's Exhibit No. 5.

Mr. McCarrey: Thank you.

Court: This is a bid—what date?

Mr. McCarrey: May I ask that the witness be handed both the contracts and bids?

Court: Witness may be handed Exhibits 2, 3, 4 and 5.

Mr. McCarrey: Thank you.

Court: You may proceed.

Mr. McCarrey: Now, Mr. Fowler, this last exhibit which was given to you and which you identified, was that the bid submitted by the Northern Truck Lines upon which the formal contract, No. 2, or the later contract in date, was issued by your office? A. Yes.

(Testimony of J. M. Fowler.)

Q. Now, Mr. Fowler, I think you have, through defense counsel here, testified that you were in charge of these instruments in your office—in other words, you had control of them.

A. That is true.

Q. And to your best knowledge and belief, these documents that you have are the ones originally submitted to you?

A. Yes, these are the originals.

Q. You don't think, then that Mr. Dunn may have come along and put these in to win this law suit?

A. No, sir.

Mr. McCarrey: That is all.

Court: You may cross examine, Mr. Grigsby.

Recross Examination

By Mr. Grigsby:

I wouldn't be sure without checking the files that any bids were ever filed in my office by Mr. Dunn himself. I believe he submitted a bid since that date, and thereupon,

W. H. CHAMBARD

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination [26]

By Mr. McCarrey:

My name is W. H. Chambard. I live at 325 L. Street, Anchorage, Alaska, have lived in Anchorage since September, 1939. I am employed by the Civil Aeronautics Administration at Anchorage, Alaska.

(Testimony of W. H. Chambard.)

I am Chief of the Accounts Section. As such, I would have knowledge of all expenditures made on contracts. I recall having had an expenditure made by the C.A.A. to the Northern Truck Line. Those documents you hand me are purchase orders that were issued to the Northern Truck Lines as the result of the contracts that have been submitted. Also, I have our payer's card record indicating each individual payment, and then I have tapes here that I totaled up the payers cards to get the total amount paid on each contract to the Northern Truck Lines. Those papers are part of the original official records of the C.A.A. Anchorage office. I have been in charge of those instruments. They have been entered in the regular course of business. Without my knowledge or without my consent, they have never been out of the office.

(Document admitted in evidence and marked plaintiff's Exhibit No. 6.)

Witness continuing:

According to our records on contract No. 1429, which covered hauling out of Anchorage, it came to \$7,739.95, and contract No. 1437 covering hauling out of Valdez came to \$47,185.99, making a total of \$54,925.94. The \$47,185.99 was on contract No. 1437 which was the big contract covering hauling out of Valdez. Checks were issued in the total amount of that sum. In other words, the Northern Truck Line has been paid in full as a result of these two contracts.

(Testimony of W. H. Chambard.)

Cross Examination

By Mr. Grigsby:

I have no idea what the company made out of that as a profit.

Redirect Examination

By Mr. McCarrey:

We do not keep track of what these companies make on these contracts, and thereupon,

J. M. FOWLER

heretofore duly sworn, resumed the stand for testimony for and in [27] behalf of the defendant.

Direct Examination

By Mr. Grigsby:

(Witness is handed two papers.)

Witness continuing:

These papers are bids that were received last season from Earl Dunn, which you requested me to bring in this morning. They are signed by Earl Dunn. Two different bids.

(The two papers were admitted in evidence as Defendant's Exhibits A and B.)

Witness continuing:

These bids are submitted through the office that I am in charge of. There is no expense to the applicant in filing these bids. None that our office would require. The applicant does not have to furnish any labor other than whatever it takes to arrive at his bid. The plaintiff, Earl Dunn did not

(Testimony of J. M. Fowler.)

furnish any money, labor, equipment and supplies in procuring any contract that was made with the Northern Truck Line. Not to us, and thereupon,

EARL DUNN

a witness in his own behalf, having been theretofore sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

My name is Earl Dunn. I reside at 710½ East Tenth, Anchorage, Alaska. I have resided in Anchorage, Alaska since '44, with the exception of short periods that I was away from the city. That has been my address since '44. In the year 1943, I was located at Dawson Creek on the Alcan Highway and was in the business of trucking. At that time we hauled for Ray Jewell. My brother was in partnership with me and he had some trucks with Mr. Spinney and I had some with Ray Jewell. I was doing trucking work on the Alcan Highway. I know the defendant, Mr. Haugen. I first met him in Dawson Creek in the latter part of the summer of '43. Dawson Creek is just a village that grew up with the [28] Alcan Highway and I was crossing some vacant property and observed a man working at a truck. Well, having trucks myself, I stopped and asked him what was wrong. How things were going. He was having difficulty with the brakes, so I give him some of my experience with them and he required a part for them and I told him if he

(Testimony of Earl Dunn.)

would come over to our shop that I had some spare parts. That was the brake cylinder for the wheel and I had some extra ones in our shop. We maintained a shop there. My brother and I operated three trucks, a GMC, an International, and a Ford. One carried 2,000, or 25 gallons; the other one was probably 1800 and the next 1800, too. They were bulk tankers for hauling fuel and gasoline in bulk. I had been doing that type of work along the Alcan Highway. That was any type of liquid fuels—whichever the Army wanted transported. We started that early in the Spring—it was the winter of '43. We had been hauling bulk oils the year 1943, and liquids for the Army. I had occasion to see Mr. Haugen quite often because of our trucking and because his place was between ours and uptown—up to the village. Mr. Haugen was trucking and there was more than one truck sitting around the yard. There was an International, one was a Chevrolet, and one was a Federal. Those trucks were constructed to haul bulk oil. He had been doing similar work to the type I had been doing, for another contractor. I saw Mr. Haugen quite frequently. In the latter part of 1943, the work was just tapering off. The road was practically built and there was very little hauling. It was quite difficult to get a trip or load. The prospects looked worse for 1944. The work was pretty well completed in 1943. On several occasions, Mr. Haugen mentioned to me that if he could just get up to Alaska, he knew that he could get considerable haul-

(Testimony of Earl Dunn.)

ing. That conversation was in the late fall and early part of the winter and he said that he heard that George Nehrbas—in fact, I believe he said he was acquainted with him—in Fairbanks—now, I didn't know anybody in Alaska because I had never been there—and if he could get up there, why, he could contact Mr. Nehrbas. So this went on for some time and he asked me if I could take him up. I had a car and after some negotiating and further conversations, I said I could and the final agreement [29] was, by about the time we started, that should any work be found, we would divide it between us and be in partnership. That final agreement would be along about December when we discussed it more often. There was really nothing at all to do then. I had never been to Alaska before and I didn't know anybody in the Territory. Mr. Haugen asked me if I would take him to Fairbanks. The terms and conditions under which we were going to Fairbanks, and the reason for going to Fairbanks, was that if he could get any hauling up here, any profits that might be made, we would divide between us. We both had equipment. My brother was present at different times when we had those conversations. Nobody else. My brother died on the plane here last fall. Yes, we went to Fairbanks—in my car, a Plymouth Sedan. I took Mr. Haugen with me. Mr. Haugen did not have plenty of money when he left. He asked me to loan him some money, \$75.00 to just pay his own personal expenses. I loaned him that money. He paid back

(Testimony of Earl Dunn.)

part of it. After we went to Fairbanks, he went in to see a gentleman by the name of Mr. Nehrbas, who operates the U-Drive and sells trucks, cars. I did not talk with Mr. Nehrbas at all. He was Mr. Haugen's friend. Mr. Haugen came out after talking to Mr. Nehrbas and said there wasn't anything doing up here, but that Mr. Nehrbas said he should go over to Anchorage—there might be some work there. We came to Anchorage. I brought Mr. Haugen with me in my car. We arrived in January, and the latter part of the week, 1944. It would be after Wednesday. We were only here two or three days and apparently he could not find any work, so he became discouraged and wanted me to take him back to Dawson Creek. I stayed at the Lind-Dudley Hotel. Mr. Haugen stayed in the same room with me. We each paid our own expenses. He did not buy any gas on the trip, nor fix any tires. On the Sunday morning I refer to, we decided to drive around the outskirts of the city before we started back, and, driving down one street, I observed a man out in the front yard, so I started to slow up. Mr. Haugen wanted to know why I was stopping. "Well," I said, "there is a gentleman I think I would like to talk to. He looks like a business executive." So I stopped, and the latter turned out to be Marshall Hoppin we held conversation with. He was not raking leaves at that time. He was shoveling [30] the snow off his path. While we were talking to Mr. Hoppin, we remained seated in the car and Mr. Hoppin came over to the car.

(Testimony of Earl Dunn.)

Mr. Haugen heard what the conversation was. The conversation was in relation to any trucking that might be up here and Mr. Hoppin was interested and told us to come up and he could go in further to it in his office. He said that there was a shortage of trucks here and they would be letting contracts. I told Mr. Hoppin that I and Mr. Haugen had some trucks at our disposal and were looking for contracts. As a result of this, Mr. Hoppin asked us to come to his office. We went up to his office. It was either Monday or Tuesday morning we went up. It was shortly afterwards. Mr. Haugen went up with me. Mr. Haugen did not enter into the conversation very much. After we went up to Mr. Hoppin's office, the conversation I had in Mr. Haugen's presence with Mr. Hoppin was in the matter of how and in what way they were going to transport this bulk fuel to various stations. They were just then wanting to change over from drums and there was a shortage of tankers up here, and so they just wanted—went into it to see if we could haul the oil in bulk. I told Mr. Hoppin that between us we had sufficient number of trucks to haul that quantity of oil.

When I was talking to Mr. Hoppin, I represented myself to be the Manager of the Northern Truck Line. Mr. Haugen had no objection to that. I was not trying to get the contract for myself. I was only getting it for the Northern Truck Line. That was our agreement when we were discussing it in Dawson Creek. Mr. Haugen said they already had

(Testimony of Earl Dunn.)

bills printed and they had been in operation in North Dakota and in that manner, we could go on using the stationery. All the way through, it seemed quite all right with Mr. Haugen for me to represent myself to be the Manager and I did so. We may have went up once more to see Mr. Hoppin before I took Mr. Haugen back home. He still wasn't very sure that we would get any work to do so he asked me to take him back down again to Dawson Creek. That is about 1700 miles. I took Mr. Haugen back there at his request. I was to take him back down, when he could do some work on the equipment and then come right back up and remain here [31] in the city so that whenever the C.A.A. wanted further information, I would be right here so I could contact them. Mr. Haugen understood that. I was still representing myself to be Manager of the Northern Truck Line. At no time did he ever object to that. It probably took two or three days to arrive back with Haugen in Dawson Creek. It was in January—the latter part. After I arrived back in Dawson Creek, I did have further discussion with Mr. Haugen about the C.A.A. contract and with my brother, in Mr. Haugen's presence. The understanding was that I would come back up here and remain here so as I could take care of what business might turn up and if I could promote any more business, why I would do it, which I did. I came back. I stayed down there only a day or two. I came back the second time in my passenger car, directly to Anchorage. Upon my return to Anchor-

(Testimony of Earl Dunn.)

age, I started making contacts around the city and eventually I succeeded in getting the hauling of the Morrison-Knudsen Co. That was the contract that Mr. McDevett referred to this morning. I came back alone when I came back. Morrison-Knudsen told me we could start hauling as soon as we got the trucks up here. I wrote a letter to Mr. Haugen and asked why the trucks weren't up here. It took them considerable time before they got them in shape for the travel, and serviced. I had a truck of my own brought up here. It came up at the same time that Mr. Haugen's trucks came up. That would be close to March because I was here most of the month of February alone and then I started back to Dawson Creek to see if I couldn't hurry the trucks up a bit because Morrison-Knudsen had the freight here and they wanted it hauled, and I met them on the way up this side of Whitehorse. When I say I met them, I have reference to my own truck was coming up. One of our drivers was bringing it up. The driver was paid by my brother and myself. They were operating our truck. At that time I believe Mr. Haugen had a Chevrolet; there was a Chevrolet, there was a Dodge in there too, and an International belonging to Harry Tido. It was also coming up. Harry Tido was coming up in conjunction with the same contract. He worked on the contract when he came up here. He was to [32] be paid just some 20% less than what the contract would bring. As it turned out, I believe it was around 12¢ a mile that he got. There were two Northern Truck

(Testimony of Earl Dunn.)

Line trucks brought up. Two of their own trucks, and they came up the same time that I had my truck brought up. I paid our own driver for bringing our truck up. When those trucks arrived, I put them to work on this Morrison-Knudsen contract. To my knowledge, Mr. Haugen never went to have a conversation to get that contract with Morrison-Knudsen. I obtained that on my own for the Northern Truck Line. My truck participated in that contract to the extent of two loads. It may have been three. It was either two or three loads. I received the money for hauling that. I got the money from the Northern Truck Line. The original check was handed to me by Mark McDevett. It was written out to the Northern Truck Line. I brought the check into town and gave it to Mr. Meadors, who represented himself to be the President of the Northern Truck Line. This check was given to me about the latter part of May and some days later, I gave the check to Mr. Meadors and they, in turn, paid me for that. It may have been close to \$600.00 I got out of that. I had to absorb my own expenses. I did not drive personally on that job. After my return trip from taking Mr. Haugen to Dawson Creek, I was looking around for additional contracts. That is something that you just can't go in the store and buy over the counter. It takes considerable time for to make contacts when you are a stranger in the city and I was up on numerous occasions discussing the bulk oil situation with Mr. Stone. I believe he is the Chief of the

(Testimony of Earl Dunn.)

Maintenance for the C.A.A. The office told me Mr. Stone is now in the States. I had conversations also with Mr. Fowler, but principally we were concerned in trying to improve the distribution of bulk oil to the Civil Aeronautics Administration and that conversation was principally with Mr. Virgil Stone. I believe that one contract—I signed the bid along with Mr. Haugen for one sometime in March, I believe—about the second week in March.

(Plaintiff's Exhibits Nos. 5 and 2 are handed to the witness.)

Witness continuing: [33]

I can identify those exhibits 5 and 2. These were the invitations issued to the trucking public to bid on the hauling of freight—general freight and bulk fuel. My signature appears thereon on both of them. It is in my own handwriting. I made all notations that is on those bids and Mr. Haugen signed his name. That was all that he done with them. There were some notations that was made. I discussed those with Mr. Haugen. It was perfectly all right for me to sign my name as Manager and I do appear as Manager on both of them. Those were the same bids that I submitted to the C.A.A. that the Northern Truck Line received a formal contract for. I know that because it specifies the moving of the same freight to the same stations and at the same price that the contractors awarded it to them on. I did most of the speaking when Mr. Haugen and myself used to go down to see Mr.

(Testimony of Earl Dunn.)

Stone and Mr. Fowler. Mr. Haugen wasn't with me all the time. He wasn't even up here. He came up here towards the last, but during the negotiations with the maintenance chief I was up seeing him a number of times to answer various requests and information that he wanted. I believe those bids were submitted at different times. They are dated differently. I made both of them out. They are for two different contracts. Those bids were submitted after the trucks arrived. I believe Mr. Haugen took these bids down to the Civil Aeronautics office after lunch on the first of April in '44 and the trucks came up in March. They had been hauling for Morrison-Knudsen. I remember that the first day of April was the time that they were to be opened and I know that I just arrived back in time to fill them out and Mr. Haugen took them down that day. I was out of the city on the last two days of March. My understanding with Mr. Haugen from the Northern Truck Line at the time those bids were submitted and we filled them out was that we would do as much hauling as we could ourselves and any trucks that was hired and any profits that would be made, that we would divide them. That was the understanding at the time I submitted those bids. Mr. Haugen didn't object to that. Mr. Haugen represented himself to me to be a partner in the Northern Truck Line; that he was partner with [34] the Northern Truck Line and that he could do business in the name of the Northern Truck Line. I had never met any other members of the Northern

(Testimony of Earl Dunn.)

Truck Line until after the contract was awarded to them. As far as I was concerned, Mr. Haugen had ample authority to represent the Northern Truck Line and to authorize me to go out and get contracts. There never was any question to the contrary. After these bids were submitted and the formal contract was offered to the Northern Truck Line, we went up to the office to sign for the contract and when I went to sign on the contract—it may have been a week elapsed after these bids were put in before the contract was let. A week later, I was called up to the office by Mr. Stone. He wanted a little further information about the hauling of the oil and I made a notation and initialed it, about the cleaning of the drums that was. That was prior to the time I went up to sign the contract. I did go up to Marshall Hoppin's office to get a telephone. That was in the spring. I had the telephone put in my house. I paid for it but put it in under the name of the Northern Truck Line. That was before the signing of the contract. It was some time after the trucks arrived. I went ahead and got this telephone and put it in the name of the Northern Truck Line.

When we were called up to sign the formal contract after it had been awarded, Mr. Haugen and myself went up to the office; and so, when I come to sign on the contract, they asked me by what authority I had for to sign. And I said that we were partners in it. Mr. Haugen had a slip of paper, which I didn't see what was on it, apparently authorizing that he was the one to sign for the

(Testimony of Earl Dunn.)

Northern Truck Line. They wouldn't accept my signature. They said that just a verbal agreement wouldn't be sufficient authority in dealing with a contract of this size. Miss Hasler of the C.A.A. was the party that objected to that. She was transferred last year. She was the party that said I had to have some written authority. So Mr. Haugen, in my presence, signed the contract for the Northern Truck Lines. That was satisfactory as far as the C.A.A. was concerned. There was no objection thereto.

Well, we went back out again and there—he was still agreeable that I would go on and share in the business, but in a short time there [35] was another gentleman arrived up from the States. He was Mr. Meadors. I never had heard of this man, Mr. Meadors, before. He represented himself to be the president of the Northern Truck Line. I had a conversation with him in the presence of Mr. Haugen. He said that he would manage the business. That Mr. Meadors would manage the business while he was here and when he wasn't here, Mr. Haugen would; that Mr. Haugen had no business making any arrangement with me. I discussed with Mr. Meadors and Mr. Haugen—in Mr. Haugen's presence—the arrangement I had. Mr. Meadors just didn't say I could have any share at all in the profits. After that, well, all contracts were let and I asked on several occasions about doing a little hauling. I asked Mr. Haugen.

Q. Did you ever ask Mr. Meadors?

(Testimony of Earl Dunn.)

A. He left right away to go back to the States.

Witness continuing:

I asked Mr. Haugen personally. He just didn't have a load any time I asked. I did that on several occasions. The answer each time was he didn't have any load that day. It was September before I finally got started hauling for myself. It would be from May until August—through August, when I made these requests to Mr. Haugen. I went to Mr. Haugen on more than one occasion and requested a haul. He never had a load for me. I started to look around for work for myself. All seasonable contracts had been let so far as I could find out, for some time. Eventually I did contact one of the men in the Army at the USED and from them I did get a contract for hauling rails. That contract was let—we negotiated in June but there was nothing that could be hauled until after July. A bridge went out and they couldn't get the rails up to their destination. And then when I had gathered up my equipment and arranged for some more, they decided not to haul the rails. So then they didn't decide to haul them again until away long in September, and I spent all summer endeavoring for to get some work to do. I had to get some work because I had—by June I had used nearly \$2000 of money beyonging to myself and my brother in my expenses. I had been—for six months there had been no money coming in—that I had earned no money—and in July I needed more money to carry on, and I had to borrow \$1200 here in the city. [36] I did borrow

(Testimony of Earl Dunn.)

some from Thomas Bevers. I gave security for that, one of my trucks in the form of a first mortgage. It cost me nearly \$3000 dollars before I had made any money. This dates over a period of nearly eight months. A car costs considerable money to operate. I leased a house, which was just as expensive as hotel bills. The first work I had when I made money other than that short haul for Morrison-Knudsen, was in September of 1944.

Cross Examination

By Mr. Grigsby:

My first trip to Alaska was in 1944. I am a citizen of Canada. I was born in Canada. I am 47 years old. I was as much in one country as the other, that is, Canada and the United States. I mean the United States proper.

Q. How many years did you serve in the penitentiaries in Canada?

Mr. McCarrey: Now, if it please the Court, under the rules of evidence in the Territory of Alaska, that question is not proper and I ask it be stricken.

Court: Objection sustained.

Witness continuing:

I was convicted of a crime in Canada and served a term in the penitentiary for it. The crime was theft. I was convicted several times for theft in Canada and served terms in the penitentiary twice for it. I did plead guilty here in the Commissioner's Court last December for larceny of Govern-

(Testimony of Earl Dunn.)

ment property and paid a fine of \$300.00. Mr. Haugen never showed me any authority under which he had a right to make me manager of the Northern Truck Line. He never showed me any written paper. I knew him up at Dawson Creek. They had a sign up there, only on their equipment. That was the Northern Truck Line. Mr. Haugen was conducting some freighting there with trucks with that sign on them. I do not know in what capacity, except that he was managing the work. I said that I and my brother had some trucks there. I said I had an International. I did have an International. I did not have a Chevrolet. [37] I had a GMC, International and Ford. They belonged to my brother and myself. Two of them were purchased in Canada and one was purchased in the States. It was built to order. The GMC was purchased in the States. The Ford was purchased in Dawson Creek, Canada. One was destroyed in a collision. The one that come here was purchased in Dawson Creek. It was a Ford. It was purchased right in Dawson Creek. I would have to send back and get the papers that my brother purchased it from. I didn't actually but that truck. It certainly was not a government truck. I did some work on that Knudsen contract with that truck took a load to Northway. He was to pick up a load at Whitehorse and take it down to Dawson Creek, and I believe he did it.

Q. Don't you know that was seized by the gov-

(Testimony of Earl Dunn.)

ernment and taken back to Dawson Creek as government property?

A. It was released—it was not seized and it was released and everything. There was plenty of evidence to prove that there was nothing wrong with any of the equipment.

Witness continuing:

The truck was operated out of Dawson Creek until the shop burned down, only a year ago. There was not a trial over it. There were many trucks stopped on the highway. This one was not seized ever while I was with it. I do not know except by rumors, that it was seized. My brother did not rumor it to me. He was not arrested in connection with it, nor I was not arrested for any other theft of government property.

Q. Nor your brother?

A. Yes.

Witness continuing:

I am sure that I brought Mr. Haugen here from Fairbanks in January of '44, in a car. I had no trucks here at that time. Before I left Dawson Creek with him, I had entered into a verbal contract with him that any hauling either of us got in Alaska, the profits would be divided equally. At that time he represented himself as being connected with the Northern Truck Line and it was agreed that everything would be done in that name and that I would be manager. From that time on, as long as I had any dealings with Mr. Haugen, I held myself out as manager [38] of the Northern Truck

(Testimony of Earl Dunn.)

Line, Inc., with his permission, when he was with me. Yes, and when he wasn't with me I did.

Q. And were you manager?

A. I was obtaining the contracts.

Witness continuing:

I considered myself a bona fide manager of the partnership. Yes, of the Northern Truck Line, Inc. With his permission I was an officer of that company and I represented myself as such to other people. I considered myself, in good faith, the manager.

We was—the profits was to be the salary. Our arrangement was to share the profits. Salary was never brought up for him or myself. We were to share profits equally. I represented myself as being the Northern Truck Line. That was with the best of sincerity on my part. I was the manager of the Northern Truck Line, Inc., in Alaska, appointed by Mr. Haugen. He didn't show me any authority under which he had power to appoint me, other than all his stationery was marked Northern Truck Line. He received letters and sent them out on Northern Truck Line stationery. He had stationery and he had trucks. He did work for the Northern Truck Line, Inc., and that's all. I brought two trucks to Alaska and I purchased two here. I bought two trucks from agents of the Ford Motor Company, Mr. Hoyt and Mr. Barret of Fairbanks. I did that last year, in '45. No, I did not buy trucks in 1944. There was no work for the trucks I had here. I

(Testimony of Earl Dunn.)

came down in a car. Later some of the Northern Truck Line trucks came down and one truck of mine, a Ford. That was not the only truck I ever had that was here in '44. The GMC was here. It arrived here in May, the latter part. I stayed here all that summer. I negotiated a contract with the government for hauling some steel rails. My bid was accepted some time in June. I was here in June. I was away from here in June. I went back to Dawson Creek. I was in Fairbanks in June. I was trying to get equipment to perform that contract in Fairbanks and to hire men. I know Pop Miller. I saw him in Fairbanks. I tried to hire him to furnish some trucks for that contract I had with the government. That was sometime in June. He did not say that that time that he was hired out to the Northern Truck Lines and couldn't go to work for me. He said he was just waiting for word to see if they would get the contract. [39] They had great difficulty trying to get anybody to furnish sureties for them. Yes, June 9th. I do not know that they had the bond already up on the 31st of May. It might have been then. I told Mr. Miller at that time (June 8th or 9th) that I understood that they had until that afternoon to furnish the bond. I did not tell him that they had lost their contract. I said they had until that afternoon to furnish it. Until whatever day I was in Fairbanks.

Q. The 8th or 9th of June?

A. I had been told here the morning I left, by the man who did furnish part of the money, that

(Testimony of Earl Dunn.)

he hadn't yet furnished it. I left here in June, but I had no occasion to record the date. If Mr. Miller should say it was the 9th of June that I told him that the Northern Truck Company had lost their contract, that could be the date. I did not, on or about the 8th or 9th of June, in Fairbanks, Alaska, in the presence of Mr. Pop Miller—the gentleman sitting back there—and myself, in a conversation with reference to hiring him to go to work on my contract, state to him that the Northern Truck Line had lost their contract, or words to that effect. Nor to the effect that they had not been able to get a bond. That was what I was informed. It could have been that I so stated that to him.

Q. Well, who told you they weren't able to get a bond?

A. Mr. Noggle was up talking to Mr. Fowler just the day before.

Witness continuing:

That was here in Anchorage. I saw Mr. Miller the next day after I went to Fairbanks. That is only a day's drive. Mr. Noggle told me that they would have until the next afternoon or day after to raise the bond. I was merely repeating what I had been told. That was in June, all right.

Q. Don't you know that Engle, on the 21st of May, put up \$2500 as half of the bond, and Z. E. Eagleston, on the same day, put up another certified check for another half, before you ever left here?

A. Well, it was just what was told.

(Testimony of Earl Dunn.)

Q. Anyhow, you told them you didn't think the Northern Truck Line could go on with the contract because they didn't have their bond on or about the 8th or 9th of June?

A. That would be two months, nearly, after they had been given the contract. [40]

Q. And you know that during that two months the roads were so impossible no hauling could be done, don't you?

A. No, they weren't.

Witness continuing:

I left here after my conversation with Mr. Meadors, who claimed to be president, and he told me that I had nothing to do with it and nobody had any authority to authorize me to act as manager, and so he just shoo'd me out of it. Yes. That is the idea. That was it. I went off and hunted up another contract. Yes, by June 8th, I had abandoned all interest in this contract that the Northern Truck Line had. Any times that I had been discussing it with Mr. Haugen he still said that they hadn't been able to get a bond and he was worried about it. This was nearly two months after. I was in Anchorage while he was worried about getting a bond. Yes, I was talking with Mr. Haugen and he was worried about getting a bond. I have received contracts. I consider myself an average good hustler; an average promoter; just an average good talker. All the time I was with Mr. Haugen we talked to Mr. Hoppin or Mr. Fowler, or any C.A.A.

(Testimony of Earl Dunn.)

official, I was doing the talking. I imagine Mr. Haugen is able to talk for himself. The talking was my part. I was supposed to do that. Yes, I am much on getting bonds. I had no trouble getting bonds for myself. I did not get a bond on this contract because I was told I was through. Right after the contract was signed—a few days.

Q. The contract was signed April 15th, and he had until May 31st to get a bond?

A. Oh, but Mr. Meadors was here before that.

Q. I know, 24th or 25th of May, and left the next day.

A. He remained several days.

Witness continuing:

It was in the latter part of May, likely, that Mr. Haugen told me he had trouble getting a bond. As soon as they told me I had nothing further to do with the profits of the business, I certainly had nothing further to do with getting the bond. I obtained a bond for myself last year. I was no longer interested in the Northern Truck Line contract [41] after that. They were going to look after the bond between April 15th and May 1st. They were just very interested in me getting the work for them. He said he would get the bond without any trouble.

Q. And you don't know that he did have any trouble, do you?

A. Well, if it takes you six weeks to get it—it didn't take me that long last year.

Witness continuing:

I filed this suit some time last year. It could have

(Testimony of Earl Dunn.)

been October 20th. I had an attorney, I believe, send a registered letter to him. The return slip will be on file. I had demanded the money so many times. I did talk to him about a settlement. On an average of about once a month for a year and a half. This contract was let April 15th. On October 20th I commenced this suit, a year later. After October, 1945. I consulted Mr. Haugen about money on this contract several times in the year '45. That contract is '44. I consulted him any time I would happen to meet him in the year '45. It could have been in a house or in his own place—his residence. I was sitting in his car one time when I asked him. I considered myself a partner in this contract, an equal partner in the profits. In three of them, yes, one some thousands with the Morrison-Knudsen, too. On that contract, I was paid off on the basis of just what the truck hauled. I was paid so much per ton mile for what I hauled. I was not paid on a division of the profits.

Q. Still you say you had a contract with Mr. Haugen that all hauling done by either one of you would be on a 50-50 basis of the profits, but you accepted a check for \$500 or \$600, on the basis of so much per ton mile?

A. Out of \$2000, yes. I believe it had run into over \$3000.

Witness continuing:

I just didn't get any division of profits. I did ask for a division of profits, just asked for it. The settlement on ton miles was just what my own in-

(Testimony of Earl Dunn.)

dividual trucks hauled. I was to get a division of profits besides that, in trucks that was hired and they hauled for less than what I obtained the contract for. [42]

Q. Were you to get payment for the truck and man that you furnished at so much per ton mile and also a division of the profits?

A. We were both to have the same, yes.

Witness continuing:

I have never been paid on the Morrison-Knudsen contract. I have demanded payment. It wouldn't be a great amount on that. It is a trifle in view of the larger amount.

I was convicted for the theft of an automobile and accessories, at Brandon, Manitoba in 1922. I was sentenced to one year in jail, but we are doing business in Alaska now.

Q. Were you convicted for a theft of an automobile at Regina in October, 1923, and sentenced to 18 months?

Mr. McCarrey: Just a moment, please. If it please the Court, the witness has admitted already—I see no reason for a mud-slinging contest.

Court: Not if it is repetition.

Mr. McCarrey: It is the same conviction the counsel brought out.

Court: Are these the same you asked about before?

Mr. Grigsby: No, your Honor. He testified he served two terms. I have a half dozen more here. I wish to prove he is a habitual criminal by his own

(Testimony of Earl Dunn.)

admission. January 21, were you sentenced to 18 months? January 21, 1932—for breaking, entering and theft, and sentenced to three years of which you served two in the penitentiary at Prince Albert, is that correct? A. Yes.

Q. May 14, were you convicted of breaking, entering and theft and sentenced to one year? May 14, 1934?

Court: Where?

Mr. Grigsby: Regina.

Witness: Yes.

Q. September 18, 1935, at Vancouver, were you sentenced to six months for retention of stolen property? A. Yes.

Q. Automobile tires? A. Yes.

Q. April 28, 1936, at Calgary, were you convicted of theft, given one year in jail at Lethbridge?

A. Yes.

Q. March 25, 1937, in Calgary, were you convicted of shop breaking [43] and theft and sentenced to two years in the county jail at Lethbridge?

A. Yes.

Q. Now, May 1940, at Winnipeg, for obtaining money by false pretenses, did you serve three years in the penitentiary at Stormy Mountain?

A. Yes. That's about the end of it.

Q. And you were under investigation——

Court: Well, never mind about the investigation.

Mr. Grigsby: Did you ever enter Alaska illegally from Canada.

(Testimony of Earl Dunn.)

A. We filled out all the permits that was required by the United States Army.

Mr. Grigsby: Well, we will withdraw that question.

Mr. McCarrey: Does counsel wish to offer that in evidence?

Mr. Grigsby: No, your Honor. The witness has testified and admitted what I asked him. That's all.

Court: Have you some redirect examination, Mr. McCarrey?

Mr. McCarrey: If you please.

Court: You may proceed.

Redirect Examination

By Mr. McCarrey:

With reference to obtaining a bond on these contracts, when I believed I would have a share in it, I had started negotiating for bonds. I believe I had those negotiations pretty well under way. I signed off those negotiations immediately when Mr. Meadors told me they wouldn't need me any more. It appeared that they got the contract and that was all they wanted of me. I got that payment of \$500 or \$600 from Morrison-Knudsen Company. I went out and got the check and took it over and gave it to Mr. Meadors and some days later, I got the money from him. He did not pay me the first time I asked for it. He paid me the second time I asked for it. I didn't leave until I got it. I had to use pressure to get that.

(Testimony of Earl Dunn.)

Recross Examination

By Mr. Grigsby:

I signed and verified the complaint in this action. By furnishing [44] equipment and procuring contracts, is a motor car, which I drove many thousands miles not equipment?

The Court: Well, don't ask questions; just answer questions.

Witness continuing:

I drove that motor car down here in January. I used that in procuring a contract let in April. What I mean is that I am in so much money in my expenses to Alaska on account of an arrangement that I say I made with Mr. Haugen on behalf of the Northern Truck Line whereby I was to become a partner with the Northern Truck Line Company. I spent my money because I thought I was a partner. Yes, in procuring a contract I had all my own expenses and I firmly believed that I would get a share because he told me that we would split the profits between us. I did consider myself a partner with the Northern Truck Line Company. I was the manager of the Northern Truck Line Company and a partner of it at the same time. I went in as manager, in partnership with the company. We were just to be partners. As partners, I was entitled to half the profits of everything. I haven't seen an accounting of what the profits were of the performance of the contract of April 15th with the C.A.A. I have never asked for one.

(Testimony of Earl Dunn.)

Q. Well, you were entitled to half those profits, weren't you?

A. I was satisfied if I just got my wages.

Q. But you didn't work for wages, did you?

A. Since I couldn't be a partner I should be compensated for the time I spent.

Witness continuing:

I sued for whatever is on that paper. I sued for what's on the paper. Now I don't know—I sued for the reasonable value of my services. The only contract, verbal or otherwise, that I ever thought I had was a contract of partnership. While I was down here during all this negotiating, I remember attending a luncheon of the Anchorage Chamber of Commerce. Yes, I said a few words. I did not in this few words, tell the people assembled that I was the owner and had control of about fifty trucks. There was no trucks mentioned in the few words I gave as a visitor to the Chamber. I could have made a statement at some time that we could procure whatever number was required for the work.

(Witness is handed a paper.)

Witness continuing:

Yes, that would be about 49 trucks. I did give some of those copies to certain individuals. I did not hand Mr. Sump a copy. He may have come into possession of one, but I didn't go and talk freighting with Mr. Sump. Well, all right, we could say I did hand it to him. I did hand to several. Mr. Haugen told me he could get almost any

(Testimony of Earl Dunn.)

number of trucks that was required—any number—and I believe that is Northern Freight Lines that is on there—not me. This is addressed to the Morrison-Knudsen Company, Anchorage, Alaska.

(Paper offered and received in evidence and marked Defendant's Exhibit C.)

Redirect Examination

By Mr. McCarrey:

At the time that this letter was submitted to the Morrison-Knudsen Company, Mr. Haugen had knowledge of this. I did it with his consent. Whereupon, the plaintiff rested, and, thereupon,

ROBERT RISLEY

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

My name is Robert Risley. I live in East Anchorage, have lived in Anchorage since 1940, am engaged in the business of vulcanizing. I know Mr. Dunn who was just on the stand. I made his acquaintance about a year ago. I did not know him in '44. I have known him in Anchorage and vicinity. I know what his general reputation has been during the time I have known him in Anchorage and vicinity as to truth and veracity. It is bad.

(Testimony of Robert Risley.)

Cross Examination

By Mr. McCarrey:

Mr. Dunn has had tires at my shop. They were there for some time. [46] It did become necessary for an attorney to write me to have those tires returned to me after I falsely sold them without authority from the Court.

Redirect Examination

By Mr. Grigsby:

That did not have anything to do with my knowledge of his reputation. And, thereupon,

CHARLES SUMP

called as a witness on behalf as defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

My name is Charles Sump. I have lived in Alaska off and on for 14 years, for seven years in Anchorage and vicinity. I know Mr. Earl Dunn who was just on the stand. My business is trucking. I have known Mr. Dunn, I would say, heresay, for a period of about three and a quarter years, but in actuality, about two years. That is in Anchorage and vicinity. I knew him elsewhere in Alaska. I know his reputation elsewhere in Alaska prior to the last two years. I knew him prior to the last two years. I know what his general reputation in Anchorage and vicinity has been during the time since I have known him, for truth and veracity.

(Testimony of Charles Sump.)

It is bad. It smells. I heard Mr. Dunn testify with reference to handing me a copy of a letter addressed to Mr. Gebo of the Morrison-Knudsen. He handed me that right after the break-up in '44. For the purpose of soliciting my business. That is, to get my trucks and sub-contracting.

Cross Examination

By Mr. McCarrey:

I never went to Mr. Dunn to obtain work. I fully realize that I am under oath. Mr. Dunn came to me here, as I said, right after the break-up in 1944, and asked me to furnish certain trailers and trucks for hauling. Only in the nature that I went to him was to follow up on his proposal. He came to me. Yes, sir. He came to me at my home under the conditions that he was hauling rails and asked me if I would [47] go to work for him, if I would furnish the equipment. I had a conversation with Mr. Dunn during 1945. At one time I borrowed a pipe trailer off of him. That was in 1945. I went to him at that time.

Redirect Examination

By Mr. Grigsby:

The hauling of the rails was in connection with a contract that he had with the United States Army hauling from Chitina, Alaska to Sutton. And, thereupon,

J. R. MILLER

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

My name is J. R. Miller. I arrived in Anchorage on the evening of May 23 of 1944. From the Alcan Highway. I am a truck contractor. I know Earl Dunn who was on the stand here. I have known him in '43, in the latter part of '43, and the first part of '44 in Dawson Creek. I just talked to him casually, wasn't too personally acquainted with him at that time, but I did know him there, in the Fall of 1943. I knew him, of course, here in Anchorage, and met him once in Fairbanks. I know what his general reputation has been during the time I have known him at these places, for truth and veracity. It has been very bad. I met Mr. Dunn in Fairbanks, I think on the 9th of June, 1944. I had a conversation with him at that time. It was in regard to this Northern contract. This freight that was coming out of Valdez. He informed me that the Northern Truck Lines Company could not raise their bond and they had lost their contract, and he offered me a proposition to furnish more pole trailers and haul steel for him on a contract that he had. At that time, I was under an arrangement with the Northern Truck Line Company. It was through the Northern Truck Lines that I came in here. I wasn't at Fairbanks then on my way in here. We had been in here at Anchorage—had hauled a load

(Testimony of J. R. Miller.)

for Lytle and Green into Big Delta and gone into Fairbanks later on. I had not hauled for the Northern Truck [48] at Big Delta. We picked up a load for Lytle and Green on the way from Valdez. The road to Valdez was closed at that time. While here, I had made some arrangement with the Northern Truck Lines to haul freight out of Valdez on a contract with the C.A.A. I was to furnish five trucks on that hauling. It was in Fairbanks that Mr. Dunn told me, in substance and effect, that the Northern Truck Line had been unable to get a bond, and wanted me to go to work for him. That occurred in Fairbanks. I immediately wired Northern Truck Lines here, asking what the status of the position was. I got a wire back to report in Valdez. I did so. I was in charge of all trucks that went out of Valdez.

Cross Examination

By Mr. McCarrey:

I arrived here in Anchorage in 1944, from Dawson Creek, on May 23, or—— I was requested to leave Dawson Creek. I never rented a house from Earl Dunn. I had no occasion to pay Mr. Dunn rent for a house. In 1945, I drove a truck of Mr. Dunn's to Palmer, Alaska. I had his driver's consent. He was kind of a tall, slim fellow, but I am not much hand at remembering names. We were all playing around together here waiting to go to work. He was hauling coal at the time; had been out of Palmer, on a little two-bit contract down

(Testimony of J. R. Miller.)

there. And some of my boys—some of the fellows that came with me—were staying with the driver of Dunn's in this house Mr. Dunn was speaking about. However, I didn't live there. The trucks were all piled in a driveway here—five or six of them—and we took the closest truck to the back end, which was Mr. Dunn's. I and Satter drove it to Palmer, met Mr. Dunn down there, and he came back with us. Mr. Satter whom I spoke of, was one of my drivers. He did not work for Mr. Dunn. Dunn's driver is the one who gave us permission to drive the truck to Palmer. I think his name is Kenny something. I am not sure. I don't just remember his name. This driver had authority to drive the truck all the time, any place he wanted to go. I was with him on various occasions. He did not go with us on this occasion—he told us to go ahead. I don't recall exactly why [49] I went to Palmer. It was not to pick up Mr. Dunn.

As to my being asked to leave Dawson Creek, there was a trucker's association organized in Dawson Creek in the latter part of '43—Decemebr '43—and '44. Some 600 trucks were organized into a group. I happened to be present at that organization. The contracts were getting to where there was less hauling to do and those contractors down there were disregarding the truckers and bidding to get contracts, and there was a surplus of trucks. They disregarded us altogether. We gave them cost of operation, the contractors, there was five or six of them. So when the thing got to below cost

(Testimony of J. R. Miller.)

of operation, we refused to work for the new man that got it, known as the Western Transport Company. We had open house, I think, for nine weeks. We worked through the American Army from the Second Lieutenant up to General Washing in Edmonton, and also the Canadian Army up to General Roberts. I worked in the Intelligence Service, through a McKnight. And McKnight, who was Chief Inspector of Intelligence Service, was the man that gave me the low down on Dunn. At that time he was trying to locate Dunn because his brother at that time was out on bond and they were trying to catch up with Mr. Dunn on account of a Ford Truck—I left Canada because I was not working there and the immigration laws, under which I went in—when I finished work I was supposed to leave. My time had expired and me and my boys were all required to leave within 30 days after my work was compelled. That was the reason the immigration authorities gave me. That was the only reason. I understand I am on oath.

Redirect Examination

By Mr. Grigsby:

McKnight was the man who was looking for Mr. Dunn. He was the chief investigator of the Intelligence Service, which is an organization connected with the Army that are always on the lookout for stolen property—anything that might not be according to Hoyle—with the Army. I saw this Ford truck which Mr. Dunn said he brought down here,

(Testimony of J. R. Miller.)

or had brought down here from Dawson Creek. I was in Dave's yard when it came back from up here after it had made a couple or three trips for Northern Truck Lines. I was in the yard when it come off the [50] highway. It was mysteriously burnt up in a garage. And, thereupon,

CECIL SATTER

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

My name is Cecil Satter. I am in the Army right now, but I was a truck driver before I went in the Army. I have been in the Army about 16 months now. I am not doing any work outside of my duties in the Army because they forbid it right now. I haven't been in the Army for two years. I went in a year ago February. Since I have been in the Army, and before that, I have done work here besides. I drove a cab here in town for a while. I also drove the Palmer bus. I know Mr. Dunn. I have known him since '44 in Anchorage and vicinity. I know what his general reputation has been during the time I have known him as to truth and veracity. It was bad.

Cross Examination

By Mr. McCarrey:

I came by that information in meeting the truckers up and down the road and talking with them.

(Testimony of Cecil Satter.)

One was Vern Johnson, who drove for Mr. Dunn on that steel haul. He had an awful lot of trouble collecting his money. He eventually got his money. That is not all I heard about Mr. Dunn. There was that gas tank deal, where he stole the tank off of the Road Commission. That was here in Anchorage. I know the facts about it. I heard that from one of his drivers. The driver did not steal them. I presume Mr. Dunn stole them. It must have been very evident he stole them. I know because he was convicted for them. Well, he was convicted of it, so it was very evident he stole them. I know other examples where the report of Mr. Dunn's reputation is based. My wife's grandfather also had a truck on that steel haul and had trouble collecting money. I don't know whether he had got the money yet. The last I heard he hadn't. He was Joe Oats of Fairbanks. What I know bad about Mr. Dunn, in other words, is for the most part, more or less an opinion [51] I have formed.

Redirect Examination

By Mr. Grigsby:

My understanding of his (Dunn's) reputation is based on heresay. It is what you hear that establishes a man's reputation. That is what I mean by saying it is mostly heresay. I have never heard any good of Mr. Dunn, as of yesterday, no. And, thereupon,

CHRIS HAUGEN

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

My name is Chris Haugen. I know the plaintiff, Earl Dunn. I have known him since 1944. I met him first on the highway. I wouldn't be sure—it was somewhere along the highway that I met him. I don't think I knew him in 1943. I lived in Dawson Creek for several months. I did not know him there. I knew his brother. I have heard of Earl Dunn, yes, but I didn't know him personally. The Northern Truck Line, Inc. had some trucks there. We were in the trucking business there. Our home office is Williston, North Dakota. The president of the company is John P. Meadors. I had charge of some work in Dawson Creek. I looked after their equipment and their work. I don't think I met Mr. Dunn at Dawson Creek. He did not drive me from Dawson Creek in an automobile to Fairbanks. I came in a truck. He was not with me. I drove myself. It was a Chevrolet truck. That was in January '44. He was not with me in Fairbanks at all. In January 1944. I have heard his testimony that he drove *me town* here to Anchorage from Fairbanks. It is not true. I got here from Fairbanks in a truck. In the same one. Northern Truck Line's—was at that time. It was a 1941 Chevrolet. That was my first trip to Alaska. From Dawson Creek to Fairbanks and then to Anchorage.

(Testimony of Chris Haugen.)

I got down here to Anchorage about the first of February, I would say—that's awful close. It could have been the last days [52] of January. I stayed in Anchorage on that trip a couple of days—three maybe. I heard Mr. Dunn's testimony about a conversation between myself and himself and Marshall Hoppin. That occurred. We met this Hoppin over on a street somewhere close to the bay. I think it was in front of his house. I think he was shoveling snow. I am not sure how the conversation came up. We just stopped there and the man talked to us. I talked enough with him to find out who he was. Hoppin was shoveling snow when I saw him, I think. He was executing a snow shovel, or manipulating it. I couldn't tell by looking at him whether he was a boss of the various bureaus or commissions of the United States. There was the most snow I have ever seen any place—four or five feet. I don't remember of seeing any leaves. Marshall Hoppin is mistaken about his raking leaves at that time, I think. I don't remember the conversation we had with Mr. Hoppin at that time, but I remember he asked us to come up to the office. Earl Dunn did the talking up there. I have been with him on several occasions since, yes. In connection with talking about trucking. In that winter—that spring it was. On those occasions, he always did the talking. When Earl Dunn is along, he always does the talking. I am not much of an orator myself. I heard him testify that when I left Dawson Creek with him, I went to Fairbanks under a verbal agree-

(Testimony of Chris Haugen.)

ment that we would look up some freighting business—trucking business—and share 50-50 in the profits of all business that we procured in Alaska. I never made such an arrangement with him. I wasn't in a position where I could do that. I did not have any authority from that company to make a contract whereby I would take a man in partnership with the company. I was a stock holder in the company, yes. Their home office was in Williston, North Dakota. Their articles are on file here. I never had any agreement of any kind, verbal or otherwise, with him about sharing the profits of any trucking business or hauling business or freighting business which we, together or separately, should procure in Alaska, only the trucks he had of his own. He told [53] me he had several trucks. I don't remember how many, but he said he had several.

(Witness is handed Defendant's Exhibit C.)

Witness continuing:

I have seen that before, yes. I first saw that a day or two ago in your office. You handed it to me. You got it from Sump. Sump was there. I had never seen it before. I heard Mr. Dunn's testimony on cross examination here to the effect that he put this letter out with my consent. I never gave my consent. I never did give my consent. I never consented to any such letter being written. The Northern Truck Lines had similar trucks to the two—five-ton trucks carrying 3200 gallon tanks on

(Testimony of Chris Haugen.)

semi trailers, as represented in that letter. We have 3200 gallon tank trucks. We had two of them at that time. We had two 2600 gallon trucks with tanks. We had two small trucks that held, I believe, 1800—between 1500 and 1800. That's all the small trucks we had in the tankers. We did have ten trucks carrying 1600 gallons. We had eight trucks altogether. We did not have 30 trucks with stake bodies. The Northern Truck Line never had or under its control or its possession, 49 trucks at that date. When we came here we didn't have control of any more than we owned. Eight of them. That is all we had. I never told Mr. Dunn that we had 49. We did not have an option on ten 10,000 gallon storage tanks, nor on a number of smaller ones. We did not have a well equipped repair shop in Canada or Alaska. We had it in North Dakota. We did not anticipate moving that shop from North Dakota to Anchorage. It could not have been done. I absolutely never authorized Dunn to make any such representation as that. Nor the rest of that stuff—the option on 10,000 gallons, no. Mr. Dunn did visit the C.A.A. offices with me, in connection with getting information from the C.A.A. about prospective hauling and freighting. He did visit me in that connection. His interest in it was the use of his trucks. I don't know what trucks. He claimed he had several. I mean to use what trucks he claimed he had. The arrangement under which we were to use his trucks was to pay him for it the same as we did on the Morrison-Knudsen contract,

(Testimony of Chris Haugen.)

so much a ton mile. When I had used one truck two or [54] three loads—I think two—and then it disappeared out of here all of a sudden. I heard it went to Dawson Creek. That is the Ford. That is the only truck of his we used in connection with any hauling. We never used his GMC truck. It is not true that he loaned me \$75.00 for my expense money to get down here from Dawson Creek. He loaned me no money whatever. After we got through with the work for Morrison-Knudsen, we settled on a per ton mile basis. We never had a contract with Morrison-Knudsen. We just hauled for them. He made no demand for a division of the profits, nor asked me what they were. There was no demand for anything else on the settlement of that contract than what he got. The first I heard that he claimed we owed him for services rendered and equipment furnished and money used in procuring the contract of April 15th with the C.A.A., was when he sued us. I don't know whether we got a demand from him before that through Mr. Davis, his lawyer. We might have got a letter. I don't remember. The first I saw the summons and complaint was when I came to your office (indicating Mr. Grigsby), you told me about it. If I did get a letter from Mr. Davis demanding payment, I never did before that receive any demand from Mr. Dunn. I have met him often here in Anchorage. He never made any claim to me personally on the street or anywhere else, demanding a payment for services rendered.

(Testimony of Chris Haugen.)

Cross Examination

By Mr. McCarrey:

I think that I met Mr. Dunn first in 1944. His brother rented a tank from me in Dawson Creek. Dawson Creek was about the size of Anchorage in 1943. Anchorage is about 10,000, I think they estimate. I think Dawson Creek had 10,000 at one time. I think Whitehorse had 20,000. I think there were 10,000 people in Dawson Creek in 1943. I don't know for sure. I don't believe there was any name on some of those streets in Dawson Creek. Our garage was five, six, seven, eight blocks from the bank. There were camps all around Dawson Creek. I don't know how many people would be there in these camps. Where we had our garage was a wheat field before we came, so whether it was inside the corporation or not, I don't know. I believe before the war Dawson Creek was five or [55] six hundred. The camps I was speaking about were in similar vicinities as where we were at. I don't know the actual population of Dawson Creek in the summer of '43. I think maybe 10,000. I have no idea where the boundaries of Dawson Creek proper were. If those camps did not compose a part of Dawson Creek as permanent residents, well, I wasn't in Dawson Creek myself. I suppose the bank was in Dawson Creek. I said I rented that tank from Mr. Dunn's brother. A man that was driving a truck could be in Dawson Creek and not see him (Mr. Dunn) in six months because maybe

(Testimony of Chris Haugen.)

he came in late at night and left so, you wouldn't see him for six months if trucking was busy.

When I first came to Anchorage, we lived in a little house over on—well, lived three or four places. When I first came here, we lived in a house on Anderson a couple of days. The first time I came to Anchorage, I stayed at the Lind-Dudley. I met Mr. Dunn and I stayed with him, in the same room. I met Dunn the first day I came here. I met him on the trip. I met him down the road. I met him once or twice before on the trail. I couldn't say what date it was or I wouldn't be sure where at. I couldn't answer whether this was 1943 or '44. It would be before I came to Anchorage. I checked up on it, and it was one of the last days of January or first of February I come to Anchorage, but I have no date for sure. I testified that I met Dunn before on the road once or twice. I couldn't say how long before January 31, 1944. I was trucking during the month of January, 1944. I was hauling oil from Dawson Creek to Whitehorse or different places. I never came to Alaska hauling oil. We hauled a load of oil from Northway to Dawson Creek. I don't know where I met Mr. Dunn. I wouldn't be sure. I admit that I met him before. I think I met him in the hotel here in Anchorage. I am not sure whether he had a room there by himself before—whether I met him in the hotel or saw that foreign license in the hotel—or saw the foreign license on his car. I might have seen that. I did stay with Mr. Dunn in the Lind-Dudley Hotel. I

(Testimony of Chris Haugen.)

think I paid my rent. I think Mr. Dunn paid for his. Mr. Dunn was not with me when I was talking to Mr. Nehrbas in Fairbanks. If Mr. Nehrbas were to testify that Dunn was with me, I [56] I think I would say Mr. Nehrbas was telling an untruth. He wasn't with me. I would say Mr. Nehrbas was telling a lie if he said he was with me. I was riding around in Mr. Dunn's car after I met him at the hotel, because it is no good to drive a truck around town. I was looking at the sights. My purpose for coming to Anchorage was to see my brother at Fort Richardson. I was on a pleasure trip, and I drove a truck on a pleasure trip. I don't know how to answer your question as to whether I couldn't drive around town because it was no good. I drove the truck up here on a pleasure trip, part of the way. I didn't drive it from Dawson Creek on pleasure. I did from where we unloaded at Whitehorse. The company had some equipment and had no use for it in North Dakota, and work on the highway was wound up, so they wanted to sell it if they could and I thought probably we could drive it to Fairbanks—we could get loads that far—and sell it. When I come to Fairbanks I found there was no sale for trucks any more than there would be at Dawson Creek because work had been completed. Of course, we couldn't sell our equipment in Canada because of duty on it. While I was in Fairbanks, I had an idea. I had a brother out at Fort Richardson, so I come here to see him. I went to Fairbanks because we thought we could

(Testimony of Chris Haugen.)

unload some of that equipment. I did not take a load of freight up there. We could get a load to Fairbanks if we sold our trucks too. We figured we could. We never knew whether we could get loaded or not. When the road was almost completed, it was a guess proposition. I was alone when I went to Fairbanks. When I said "we figured we could get a load", that is the company equipment, I went to Fairbanks alone in this truck. I came to Anchorage alone.

Q. Now, after you went to see Mr. Hoppin, did Mr. Dunn represent himself as Manager of the Northern Truck Line with your consent?

A. It wouldn't necessarily have to be consent.

Q. Answer the question, yes or no.

A. He might have. I am not sure. It is a long while ago and my memory isn't too good.

Q. I can understand that Mr. Haugen. Did you know at that time [57] that Mr. Haugen was representing himself to be the manager of the Northern Truck Line?

A. There was no doubt about that when I came back with the trucks.

Witness continuing:

I don't remember what he said he was in Mr. Hoppin's office. I admitted that Mr. Dunn did most of the talking. In fact, he does all of it when you are with him. I am not much of a talker. I was glad to get the contract. I went back down to Dawson on a truck. Drove the same truck down. I came back the last days of February or the first of March.

(Testimony of Chris Haugen.)

I tried to check up on that, but I had no definite way of proving what day I come back. I am not sure. I went to Dawson again in the fall of 1944. I came back to Anchorage in February of 1944 on my second trip. The last days of February in 1944. I came back because there was no work for our trucks down there. I don't think I ever received any correspondence from Mr. Dunn. I don't think I got a letter from him that he sent me. The second time I came back there were several trucks come up. Most of us was loaded to Fairbanks. I refer to the trucks and drivers. Dunn claimed to own one of them. I didn't own any. I didn't claim to own any then. I was driving a company truck. We got a load to Fairbanks, which we would have come for regardless, and we had to take these trucks back to North Dakota or back to the States or get them out of Canada, so if we got a contract here that would be swell. If we didn't, we could probably do some work here until the war was over and then sell it. I don't think I ever received any correspondence from Mr. Dunn to come back up here. Mr. Dunn's trucks did not arrive here at the same time ours did. They were coming up more or less in a caravan. We unloaded an International at Northway, of stove oil, that was brought from Dawson Creek to Northway. That was one of ours. That truck come to Anchorage. I didn't own any of them. I was not on that truck. I am trying to think where we unloaded the other load, but I don't remember; but we brought two trucks to Anchorage

(Testimony of Chris Haugen.)
and three went on to Fairbanks. Dunn's truck, the Ford, went to Fairbanks with a load. I did not go to Fairbanks myself that time. I came [58] right across over to Anchorage. I arrived in Anchorage the last part of February. I did not leave Anchorage after that to go to Dawson Creek before the fall of 1944. I did not stay here in Anchorage all the time after I arrived here the second time. I was to Valdez and Fairbanks on several occasions. When I came back to Anchorage in February, I did not have a contract with the C.A.A. through Mr. Dunn. Yes, I think I went with Mr. Dunn to see Mr. Fowler and Mr. Stone to get a contract. We were together to see Fowler and Stone and Hoppin on several occasions, I believe.

(Witness is handed Exhibits two and five.)

Witness continuing:

(Referring to exhibits.) They look familiar. That is my signature at the bottom of the first page. It looks like I signed it of my own free will. Mr. Dunn didn't hold a gun at my head and make me sign that. Yes, I can see that I signed below Mr. Dunn, but what does that mean? It is Northern Truck Line by Chris Haugen. I don't know about Mr. Dunn, there, being manager. I never wrote his name in there. He wrote that himself. I wrote my name after that. It looks like at the time I wrote my name there I saw the name Mr. Earl Dunn, manager and director of the Northern Truck Line. I did not object to that.

(Testimony of Chris Haugen.)

(Witness is handed Plaintiff's Exhibit No. 4.)

Witness continuing:

Yes, here is a copy of the contract. I signed that contract. Mr. Dunn's name wasn't on there because he didn't have no authority to sign, I don't imagine. I don't know that he had authority to put in a bid with my consent. I don't remember that signature being there. I didn't say that Mr. Dunn's signature wasn't on there. I don't remember. I filled out that bid. I did most of that work. These were partially complete when they come out. I did not make those pencil notations thereon. What I did on that bid to fill it out was to put in these figures. I think I put those figures on there on page one of said exhibit and the same on Exhibit No. 2. I don't remember the particular incident now.

Q. Well, how come "E.D." is behind there—Earl Dunn?

A. Don't [59] that refer to that writing above?

Q. I am asking you.

A. That's what I thought. It looked like it to me.

Witness continuing:

I don't know whether the same pen put the "E.D." and the figures in. I never did borrow any money from Mr. Dunn. He never gave me any money. I never paid Mr. Dunn any money only what the company paid him. I never gave Mr. Dunn any money at Dawson Creek. That is my

(Testimony of Chris Haugen.)

signature on that first contract. I had authority to sign the contract for the Northern Truck Line. I didn't have any authority to enter into negotiations with Mr. Dunn. I had authority to bind my company for fifty or sixty thousand dollars on a contract, yes. I had special permission from the company to get a bond. I had authority to get a contract. I didn't have authority to bind the company for fifty or sixty thousand dollars on it, there wasn't that much money involved. There was involved \$5,000. There was none involved on the second contract. We only had one contract that was bonded. I had authority to sign a contract, yes. I got a wire from Mr. Meadors giving me authority. I believe a copy of it is on the back of those contracts. That was the authority I presented to Miss Hasler that day. My authority to come into the United States with those trucks was because we had no business in Canada after the work finished. I brought those trucks into Alaska with authority from the Army at Dawson Creek. As to the authority from the Northern Truck Line, it was discussed through letters. I imagine you would call it authority, I had, to bring them in. It was discussed through letters that we were going to bring them up here. They asked me to use my own judgment about it. I have always tried to be on the up and up. As far as bringing the trucks to Alaska, I did have lots of leeway. I did have authority to sign the contract. I did not have to wire every time I wanted to fill a gas tank. I could sign a contract without

(Testimony of Chris Haugen.)

special authority. I couldn't enter into a contract with Mr. Dunn. I know a gentleman by the name of Swann. I don't remember the [60] first time I met him. I met him before he came to Alaska, but I don't remember where. The Northern Truck Line is not at the present time indebted to Mr. Swann. They are not at the present time, yes.

(Paper handed to the Clerk of the Court for purposes of identification, paper marked for identification as Plaintiff's Exhibit No. 7. Paper handed to witness.)

Witness continuing:

That could be my name at the bottom. I know Mr. Engel, to whom it is written. I think I wrote that letter. That is my signature at the bottom.

(Paper admitted as Plaintiff's Exhibit No. 7. Mr. McCarrey reads plaintiff's Exhibit No. 7, being a letter dated February 22, 1944, to the jury.)

Witness continuing:

I meant by this letter when I said I had been up there in a car is, well, in Canada or lots of places, any motor vehicle—self propelled motor vehicle—could be a car. So that wouldn't necessarily mean anything. Sometimes you use a different word to mean the same thing. The word car, as I write it in my letter, can mean trucks, tankers, busses, anything. I meant it to be a motor vehicle.

(Witness is handed a document and asked to identify it.)

(Testimony of Chris Haugen.)

Witness continuing:

I can identify that. That is my signature.

(Document is offered and admitted in evidence and marked Plaintiff's Exhibit No. 8 and read to the jury.)

Witness continuing:

Referring to my statement in that letter "got a wire from there that trucks are needed at once", I don't remember that particular instance. I don't remember that I received that wire from Anchorage. Somebody else could have got a wire that he showed me.

Q. But you say in the letter that you got the wire. A. Did I say I got a wire?

Q. You say: Plan on taking it with me to Anchorage. Got a wire from there that trucks are needed at once.

A. Well, that wouldn't mean [61] that I got a wire.

Witness continuing:

I didn't say I never got a wire from Anchorage. I wouldn't say under oath that I never got a wire from Anchorage. If I did get a wire, I don't know from whom that come. I am testifying that I may have gotten a wire or did get a wire, but I don't know who it's from. It's impossible for me to say. I did testify some time ago on the witness stand that my memory was rather weak.

(Telegram admitted in evidence as Plaintiff's Exhibit No. 9. Witness identifies it.)

(Testimony of Chris Haugen.)

Witness continuing:

Yes, I think I sent that. I think I sent it to him.

(Telegram read to the jury.)

Witness continuing:

With reference to my testifying yesterday that I came to Anchorage the second time the latter part of February, I told you I wasn't sure of the dates. I said I thought I come to Anchorage the latter part of February. I have no way of proving the dates that I come here only by some letters that I happened to find. If this telegram was sent about the 14th or 14th day of March from Dawson Creek, I think that is more accurate than my statement, because I have no way of being sure.

(An instrument marked for identification as Plaintiff's Exhibit. Instrument handed to witness.)

Witness continuing:

No, I haven't seen it before. But we get lots of letters that I never see; our secretary took care of them. I wouldn't care to state that the office never received it.

I recall, in my letter of February 22nd to Mr. Ralph Engel, which was the first letter you handed me today, a statement therein to the effect that I said I had sold the International truck. We did bring that same truck to Anchorage. I don't remember the man's name we sold it to. I was sold under a contract, to be used down there, and the man received all the proceeds of the hauling—and

(Testimony of Chris Haugen.)

then to bring it to Alaska, which he did. The man who purchased that did come to Alaska. [62]

When Mr. Hoppin testified yesterday that he talked to me and Mr. Dunn in Mr. Dunn's car about the trip over the highway, I don't know if he was referring to any trip. I no doubt was present at the time of the conversation, but I don't remember the particular instance. I remember talking to Hoppin, but I don't remember the conversation.

I think probably I know a Mildred Murphy. If it is the lady in question, I believe I knew her as Mrs. Dunn. I first met her in Dawson Creek. I think I met her with Dave Dunn in his car—in a restaurant—in fact, I think she worked in a restaurant. I have been to the home which I thought was known as Dave Dunn's home.

I don't think I know a lady by the name of Lea Mearns. I did not have occasion to go to the hospital in Dawson Creek. I don't even know where it was if there was one. Mr. Dunn never had occasion to take me to a medical dispensary or hospital in Dawson Creek.

I know a passenger car that Dave Dunn was supposed to have had in Dawson Creek. I think he had a couple of them. I never paid any attention as to what they were. I ride in a car or look at a car, I don't pay any attention to what they are. It is of no interest to me. I tend to trucks, yes, but something like that I pay no attention to that. You might drive up in car and I would pay no attention to the kind of car it was.

(Testimony of Chris Haugen.)

Juror: Q. Did the witness know Mr. Dunn's occupation before he had anything to do with Mr. Dunn—in a business way? Did Mr. Haugen know Mr. Dunn's reputation before he tied up in business with him?

A. I didn't know it fully until yesterday. I didn't know it all until yesterday. I heard of it, yes. You don't have to walk very far down the street to hear it.

Redirect Examination

By Mr. Grigsby:

I don't recollect when and where the name of Earl Dunn was signed to plaintiff's exhibits 2 and 5, which are shown to me, being the bids, one of which was dated March 9 and one March 11 and on which the name of Earl Dunn appears before mine. [63]

I do not remember whether the name of Earl Dunn was on them—each one of them—when I signed them. I do not remember who took this to the C.A.A. office, nor how it got there.

Those dates, the letter I wrote Ralph Engel from Dawson Creek on March 12, 1944, and the wire to him from Dawson Creek March 13, 1944, being exhibits nos. 8 and 9, are much more accurate than anything I could find in my possession. I must have been in Dawson Creek on those dates. I do not recall how long after I wrote those telegrams that I left. On my first trip to Alaska, I left in a Chevrolet truck and proceeded first to Whitehorse,

(Testimony of Chris Haugen.)

from there to Fairbanks, and from there to Anchorage, in that truck all the way, only these different points wasn't made in one day. When I left Dawson Creek, I went to Whitehorse first. I did encounter a person on the way that was proceeding in the same direction. He was Harry Tido. He was broken down at Nelson, 300 miles out of Dawson Creek. He stayed with me on different occasions in Dawson Creek. We had roomed together on different occasions. He did not work for me there. He was driving a truck. I don't remember—I don't know when he left Dawson Creek. I had discussed my contemplated trip with Tido before I left Dawson Creek. Probably before I left Dawson Creek I told him where I was going on several occasions. I don't remember any particular occasion. I imagine, I would think so, I don't remember whether I discussed with him in Dawson Creek why I was going to Alaska. I overtook him on my first trip to Alaska between Dawson Creek and Whitehorse. I was driving this Chevrolet truck and was alone. Tido is now in Anchorage. I thought I saw his face in the court room but he isn't. He got to Anchorage last night. He worked for me on this contract. And, thereupon,

EARL DUNN

called as a witness for the defendant, testified as follows:

Direct Examination

By Mr. Grigsby:

Referring to defendant's exhibit C, the letter of March 3, which [63] I testified I had typed, addressed to Morrison-Knudsen Company, I wouldn't say that was the day when it was written, but there was a date on it, very close to it, I was here March 3. I intended to date it the day it was written. I might have made a mistake in the date. I don't know who done the typing on that letter, it was done on my instructions, anyway. Mr. Haugen would be in Dawson Creek when this was written. There was a number of them typed at various times through the winter. There were other copies—several copies similar to that was typed in here certainly. They were typed at any time from January to April, whenever I was negotiating with any concern. Mr. Haugen was here some of the time while I was doing this, he supplied me with part of the information on what trucks they had, and the ones that he could get along with the ones that I could get. I said that Mr. Haugen came down here together with me first the latter part of January. He only stayed a few days. He went back to Dawson Creek and never came down here until after March 16; so from a day or two after the latter part of January until after March 16, Mr. Haugen wasn't here at all. In the meantime, I got the information

(Testimony of Earl Dunn.)

from him, Mr. Haugen, and had them typed out. I got the information before he left here. He did not, before he left, tell me he had 30 trucks with stake bodies, that is the amount of trucks that we could get between us. Yes, I said in this letter that the Northern Truck Line operate the following equipment. Yes, I said "which is maintained in the best of condition by our shop". "Own and operated"—and I named 49 trucks.

Q. Did Mr. Haugen ever tell you he had owned 49 trucks?

A. That was the two—that was the trucks I could get providing the work required it.

Q. That you could get from where?

A. The ones that would be furnished to me and to Mr. Haugen.

Q. From where?

A. That were to come from the States.

Witness continuing:

There wasn't less than 50 or 100 men from the States in Dawson Creek that was only too anxious to come to Alaska. [64]

Q. That was what you meant when you said the Northern Truck Line owned 49 trucks which are "maintained in the best of condition by our shop"?

A. The corporation wanted the work done—was only concerned with how many trucks there were.

Q. Then that was untrue wasn't it?

A. The corporation owned—it was probably stretching the truth a little bit.

(Testimony of Earl Dunn.)

Witness continuing:

I couldn't say that Mr. W. C. Williams typed that one for me. He typed some similar to this but not that one. That was done down town.

Q. Is Mr. Williams present?

(Voice from court room said "yes".)

Q. Mr. Dunn, do you remember having Mr. Williams, who just got up back there, type this, or similar letters, for you on or about March 3, and that when you got down to the point where the letter had to be signed you had a discussion with him as to how to how to sign it and then you had a conversation with Mr. Williams about how to sign that in which conversation it was mentioned that you couldn't sign it as secretary, and in which you told him: "Well, I got to have some official signature"?

Mr. McCarrey: If it please the Court, I wish Mr. Grigsby would let the witness testify.

Mr. Grigsby: I am putting the question—in which conversation it was stated, either by you or Mr. Williams, that you couldn't sign secretary because you weren't secretary, and you weren't any other officer of that kind, and you couldn't sign Haugen's name to it, and finally you concluded you would sign general manager at the time you wrote the letters. Did you have such a conversation with Mr. Williams?

A. I have an amazing memory to remember conversation to that fine detail.

Q. Well, in substance to that effect?

A. But he typed some of them.

(Testimony of Earl Dunn.)

Q. But you don't remember the conversation?

A. I don't remember it, no, not to that point.

Witness continuing:

I did say that that bid I just referred to, on which my name appears and on which Chris Haugen's name appears, was taken by Mr. Haugen to the C.A.A. I did not go with him when he took it up there, on the first day of April, the day as clearly stated thereon, the bid was to be opened. The bids were to be opened on April 1st. Our bid was taken up on the day they were to be opened.

Q. That is the day you first took it up—on the instrument dated March 9?

A. That was the mailing date out of the office—when they were issued.

Witness continuing:

We filled them out on the day he put them in the office. I saw him leave the house and go down town, I did not go with him. I did go with him, however, when the contract was to be signed. When the question arose about who had authority to sign the contract, word was sent for the two of us to come up. Yes, there was a discussion about who had authority to sign and they objected to me signing the contract because I had no authority. Yes, Mr. Haugen showed a piece of paper to Miss Hasler, showing his authority.

(Witness is handed a paper.)

Q. Is that a copy of the telegram he showed her?
In substance?

(Testimony of Earl Dunn.)

A. I would like to read it first. A piece of paper he had was a very narrow strip, about an inch wide. I never saw him produce a piece of paper that big.

Witness continuing:

He never let me see the piece of paper he had. He showed it to the lady in the office, but he didn't let me see it. He passed it directly to the lady and reached for it. She didn't keep it, she handed it back and he put it in his pocket. No, not evidently concealing it from me. I saw the paper.

Q. You said he wouldn't let you see it?

A. No.

Q. What do you mean by that? That he designedly prevented you from seeing something you wanted to see, or you just didn't see it?

A. It was [66] Miss Hasler he had to convince, not me.

Q. But you said he wouldn't let you see it?

A. He passed it directly to Miss Hasler.

Q. Will you explain to the Court and jury what you mean by saying he wouldn't let you?

A. He passed it directly to Miss Hasler, and immediately she read it, he reached for it.

Q. She handed it back to him?

A. He reached for it.

Q. Before she handed it back to him?

A. Yes.

Q. And then she handed it back? A. Yes.

Q. And he put it in his pocket? A. Yes.

(Testimony of Earl Dunn.)

Q. And you thought he didn't want you to see it?

A. Appearances led me to believe it.

Q. At that time? A. Yes.

Witness continuing:

There was something on there that satisfied Miss Hasler that he had authority to sign a contract.

Cross Examination

By Mr. McCarrey:

I know Ralph Engel. I met him in Anchorage in early spring of '44. I didn't know him in Dawson Creek.

With reference to the document counsel has questioned me about, when I say there were other truckers that wanted to come to Anchorage, the fellows that was up from the States hauling at Dawson Creek, when the hauling got over with, they were certainly anxious to haul somewhere else, and they were making every effort to contact anybody that had some work for them; and so I had arranged with my brother, who stayed in Dawson Creek, to contact perhaps 75 or 100 of the truck owners that was there from the States; so that there was far more trucks than was ever listed that could have been placed on any job within a week's notice.

Q. And that's what you had reference to in this—that you had access to that many?

A. That was, perhaps, how it should have been worded. [67]

And, thereupon,

HARRY TIDO

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

My name is Harry Tido. My business is trucking, mostly. I have been in Dawson Creek. I was there in the winter of 1943 and '44. I knew Chris Haugen there, and Earl Dunn. I came to Alaska first approximately March 4, '44. I must have miscalculated my dates. I talked to you in your office this morning. Afterwards I looked up a record to determine when I came to Anchorage.

(Witness is handed a document.)

Witness continuing:

This is a gas bill that is issued by the Alaska Highway for every individual trucker to insure you of getting gas at every station along the highway—approximately every hundred miles. That one was issued to myself. There is a record on there of where I stopped for gas during the month of March, 1944. There is no record of when I left Dawson Creek, there is a record here when we left Whitehorse. The U. S. Army made that record. We hand that to them when we get gas. That was a record of my stops where I got gas on my first trip from Dawson Creek to Alaska. I left Whitehorse the 21st of March, 1944. The next place I got gas was Canyon Creek—21st of March, 1944. The next place is Det's Bay—I don't exactly know the rest

(Testimony of Harry Tido.)

of that name. That was approximately 100 miles from Canyon Creek—it was the 22nd of March, 1944. The next one is Koidern, 22nd of March, 1944; and next one is Northway, 23rd of March, 1944. That first station was McCray, approximately 8 miles out of Whitehorse, toward Dawson Creek. We had to back track several miles to get gas. I stopped at McCray on the 21st of March, 1944 for gas. That is approximately 960 miles from Dawson Creek, 960 miles from Dawson Creek to Whitehorse, or McCray. I had an accident on my way from Dawson Creek to McCray. I was broken down at Nelson; that is 300 miles from Dawson. Yes, while I was broken down, someone coming from Dawson Creek [68] overtook me. It was Mr. Haugen. He was driving his truck, a Chevrolet. It was not a tank truck, just a box—rack—more or less. I brought that one International that I was broke down with at Nelson, in to work for him. One Ford was all the trucks I know of at that time belonging to Earl Dunn that were brought here. Afterwards he brought a G.M.C. I wouldn't know the exact date when that was brought. It might have been two or three months after we arrived here, along in the summer. I left Dawson Creek on that trip some time near the end of January and I broke down at Nelson, approximately 300 miles from Dawson Creek. I saw Chris Haugen next after leaving Dawson Creek, at Fort Nelson, the place I was broke down at. That was two or three days after I had left Dawson Creek. He was driving a Chev-

(Testimony of Harry Tido.)

rolet truck. He was alone in it as far as I know. I didn't ask him if he had any passengers, and I didn't see anybody I knew that was with him. I talked with him. There could have been just somebody riding or somebody getting off the highway, I don't remember. He continued on his way, as far as I know, towards Whitehorse. I was broken down there about six weeks altogether. I left my truck there. I stayed there about three or four days, altogether, and tried to get some repairs from the Army—or from one of the construction camps along the road. There were several of them nearby. And, of course, I had to get an order from the captain—or from the commanding officer of the U. S. Army there, to warrant me getting these parts. But they didn't have any. None were available, so I had to go back to Dawson Creek. I got a ride with another truck on the highway. I stayed there until the time that I was able to get a repair for the truck and bring it back to Nelson, get it fixed and bring that load on to Whitehorse. And from there we decided to come up here—rather, we decided before. I didn't go back to Dawson Creek after unloading at Whitehorse. I didn't even unload at Whitehorse. It was just re-billed. Instead of unloading, they just gave me a different set of bill of lading and that same order was ordered up to Northway. I took it up there. I next saw Chris Haugen, after he passed me on the trail there the latter part of January, when he came back to Dawson Creek. I don't

(Testimony of Harry Tido.)

believe I [69] know how he got back to Dawson Creek. No, I don't remember seeing him until after he arrived there.

After I got the gas the 21st of March at McCray, and the 21st at Canyon, the 22nd of March at Det's Bay, the 22nd of March at Koidern, and the 22nd of March at Northway, Chris and I came to Anchorage together. I drove Dunn's Ford truck. That is, it came up with us. I drove my own and Chris drove the other truck. From the time that Chris Haugen passed me on the trail the latter part of January or the first part of February, he had been to Anchorage and back up there, as far as I know. I do not know anything about when Dunn, the plaintiff, here, left Dawson Creek to come to Alaska, of my own knowledge.

Cross Examination

By Mr. McCarrey:

Mr. Haugen passed me at Nelson when I broke down. He offered his services to help me but there wasn't much he could do, you see. The truck was in the garage at the time and he went on. The next time I saw Mr. Haugen, well, make it between two and three weeks later. That was at Dawson Creek. Mr. Haugen had a load when I saw him the first time, when he was going up the highway. He had to have, because they wouldn't let you up without one. Yes, certainly you had to have a load, or else you wouldn't be allowed to travel the highway empty. Quite possibly, Mr. Haugen could have gone on to Northway, as far as I know personally.

(Testimony of Harry Tido.)

I couldn't say for certain that he went on to Anchorage. He could have went to Anchorage, or Fairbanks, or just a few hundred miles. I wouldn't know about that after he left there. I imagine in certain cases, you could travel the highway without a load if you had a special permit, but it was rather hard to obtain permission to travel the highway empty, or without a load, especially going north. I understood you couldn't go on a pleasure trip with an empty truck. And, thereupon,

CHRIS HAUGEN

recalled for the defendant, testified as follows: [70]

Direct Examination

By Mr. Grigsby:

I heard Mr. Dunn's testimony with reference to when I and he went up to sign the contract of April 15 with the C.A.A., and his testimony to the effect that they wouldn't accept his signature, and that I showed the lady, Miss Hasler, a piece of paper constituting my authority. The piece of paper you hand me is a copy of a telegram from Meadors. I gave Miss Hasler the telegram, which she gave me back later. This is a copy of the telegram I gave her. I lost the original.

By Mr. McCarrey:

I couldn't tell you the date when this copy was made of that telegram. I believe Katie Hasler made the copy, or one of her stenographers. I didn't make it myself. I did not request Miss Has-

(Testimony of Christ Haugen.)

ler to make that. I came in possession of it, it was attached to a contract that we had with the C.A.A. I couldn't tell you the date when I signed that contract, the original contract. I think you will find it on the last page.

Mr. McCarrey: In this respect, I am a little confused, if it please the Court. Here *were* have a contract entered into on the 15th of April and signed by John Meadors.

Witness: For some reason or other, they were re-printed, and there was new contracts made. I don't know for what reason it was.

(Copy of telegram admitted in evidence, marked Defendants Exhibit D, and read to the jury.)

And, thereupon,

WALTER C. WILLIAMS

called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

My name is Walter C. Williams. I work for the C.A.A., in the Civil Aeronautics Administration. I was so employed in March, 1944. I know the plaintiff, Earl Dunn. I had occasion to do some typing for him in March, 1944.

(Witness is handed a paper marked Defendant's Exhibit C.) [71]

(Testimony of Walter C. Williams.)

Witness continuing:

I believe I typed that at Mr. Dunn's request. I believe it would be on about March 3, 1944, as it is dated, that I typed it. I had a discussion with Mr. Dunn at the time I did that for him, with respect to in what capacity he would sign it. The conversation was, substantially, well, just—he said he wanted something that sounded official. I asked him what he wanted and he didn't particularly know, and we talked it over, and either my suggestion or his—anyway, we came about that particular general manager title. I brought up that he couldn't sign Chris Haugen's name because he wasn't the Northern Truck Lines, and he couldn't put secretary or treasurer. I wrote that out, and I was a little skeptical about the typing. I didn't want to type it in the first place. He said well, he wanted something that sounded official and we just came about using that name, general manager of the Northern Truck Lines. There was quite a discussion before I and he hit upon that name. I typed several other letters addressed to other parties. We used this one—they were about the same. That conversation was at the hotel—my residence, the Lind-Dudley. I think Chris Haugen had gone back to Canada at that time. I did not see him at all in connection with this. And, thereupon,

WALTER C. WILLIAMS

being made a witness for the plaintiff, testified as follows:

Direct Examination

By Mr. McCarrey:

In January, 1944, in the daytime I worked for the Civil Aeronautics Administration, and from 7 to 11 in the evenings, I was desk clerk at the hotel. My duties as such clerk were if there was any vacancies, to rent them, and answer the phone, and just watch them come in and go out. I was in the lobby considerable of the time during those hours, if there was anybody there to talk to, or I read during that time. During January, 1944, I met Mr. Dunn at my hotel. He was staying there. I met Mr. Haugen there at that time. He was staying there. I couldn't [72] set the exact dates. I couldn't even tell you what month it was. I just know they were there. While they were there, as guests of my hotel, I didn't talk much to Mr. Haugen, but I had considerable conversations with Mr. Dunn. I can remember the first day they came in. I went over at 7:00 and Mr. Dunn was in the lobby and after some little time, we engaged in conversation and as well as I remember at that time, Mr. Haugen was at the picture show and he came in later—probably 10:30—and Mr. Dunn introduced me to him, and Mr. Haugen retired—he said he was tired. He didn't do much talking at any time. He was always quiet. I did not at that time have any conversation with Mr. Haugen with

(Testimony of Walter C. Williams.)

reference to his business—where he came from. Oh, yes, I had a conversation with Mr. Dunn with reference to his business and where he came from. I had a conversation with Mr. Haugen about his trip up the highway. That came about probably a year later, or a year and a half. No, they did not stay at my hotel quite some time. I seemed to me like at that time, Mr. Dunn stayed a little longer than Mr. Haugen. I think Mr. Haugen left and *and* went back to Canada. I remember that Mr. Dunn had a Plymouth Sedan. I went for a ride with Mr. Dunn several times. I don't recall Mr. Haugen being along. I remember the Plymouth because I rode in it. And, thereupon,

CHRIS HAUGEN

recalled, testified as follows:

Direct Examination

By Mr. Grigsby:

Referring to my trip to Anchorage from Dawson Creek in January, and my return a few days afterward to Dawson Creek, I went back in the same truck that I came down with. I drove it myself. When I left Dawson Creek with that truck the first time I started for Alaska, I had a load part of the way. I dumped that load at Whitehorse.

Cross Examination

By Mr. McCarrey: [73]

I did testify yesterday that I came up empty, part way, on that trip. Empty to Anchorage. I said

(Testimony of Chris Haugen.)

I was loaded part way. That is what I testified to yesterday. As Tido said, you couldn't get a permit over the highway—or I don't know whether you could with a car over the highway. At one time, we didn't need those gas certificates Mr. Tido testified about. Just when they started using those I don't remember, but any the rest of the boys that had been over the highway could verify, we had a passport, cards—they look something like a registration card for a car in the States—you could just present those and get gas anywhere. Usually we had to sign for gas. In the later months we always had to sign, and we also got a sales slip showing the amount of gasoline we received. I haven't any of these slips in my possession now. I never kept any of them. In fact, we had a fire last fall that destroyed a lot of our papers we had around.

If I came together with Mr. Tido, he wouldn't sign for all the gas. He just signed for his own gas.

Q. How long did you keep those papers? Could you keep them? If you had a slip like this, pre-supposing you did, could you keep them from one year to the next?

A. They were for one trip. Each trip issued a new one.

Q. Then if I have a document here in my hand, issued 21st of March, 1943; then I have some writing on the back that gas was put in 1944. Would you say that that wouldn't be correct?

A. I don't understand it.

(Document shown to the witness.)

(Testimony of Chris Haugen.)

Witness continuing:

I understood that these slips were only good for one year, or one trip, rather.

Q. And I call your attention to the top of that page and ask if that was not issued originally on the 21st of March 1943? And then I call your attention to the back part of the page where he has some apparent acceptances of gasoline in 1944?

A. There may be some of the other boys that have been over the highway can clarify it. I can't. My understanding was that this was for one trip. And, thereupon,

HARRY TIDO

heretofore duly sworn, testified as follows:

Direct Examination

By Mr. Grigsby:

Q. Mr. Tido, I call your attention to the date on this paper you identified as containing a memorandum of your gasoline purchases. The date, 3/21/43, and the entires on the back, 3/21/44. Now, can you explain the modus operandi of the issuance of these slips?

A. May I look at this for a minute?

Q. Yes. By the way, do you know who the custodian of that slip is—up until this morning?

A. That was mine. It has been in my possession ever since last signed at Northway.

Witness continuing:

I couldn't have got that slip in '43. The only

(Testimony of Harry Tido.)

way I can explain it is that that is a mistake. I imagine such a thing is possible. There is such a thing possible as that it could have been a mistake of the sergeant that issued this. He issued it at McCray. That is where I got my first gas. I got that slip at that time. I did not have it with me already. The sergeant issues these permits to each driver, if you show him your proper identification as to who you are, and your Alcan Highway driver permit, and you make and number of truck and how much weight you are hauling, and where you are going, and even a tally out number; quite a lot of red tape to it, and they were quite pressed for time too, sometimes when things were rushing. And I see here the sergeant who issued this was not the same one that issued this gasoline, because this was issued at McCray and I also received gas there but there is a different man's name who issued the gas. So it could have been possible the sergeant made the mistake of still writing 1943. But there is something else here: That I was in possession of this slip. As a rule—in fact, at all times—we had to turn these back in to the U. S. Army station sergeant at Dawson Creek upon our return. Well, in this case, [75] there was no return, you see. I should have turned this back in at McCray upon my return from Northway to McCray—this slip would have been turned in to the U. S. Army and they would have issued me a new one at McCray to return to Dawson Creek, which would have been turned in there at the last station on the Alaska

(Testimony of Harry Tido.)

Highway. In this case when we left Northway we came to Anchorage, you see, and there was no place to turn these in so I just kept it. I know those entries were made in '44. I could swear to that, that it was made in '44; and this slip was issued in '44. It must have been, because I couldn't keep one of those otherwise. Well, there just wouldn't be any sense in him issuing one in 1943 and me having it, for instance, until the next year and then getting gas on it, because as far as these things were concerned, on that highway, they were issued to the trucker. They just enabled him to get gas at every station and enabled the U. S. Army to keep check of the amount of gas that each individual trucker consumed, just for his own record. And, thereupon,

RALPH ENGEL

called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCarrey:

My name is Ralph Engel. I live in Anchorage, am in the business of trucking and contracting. I have lived in Anchorage since May, 1944. Previous to that, I come from Berwyn, Illinois. I resided other places besides Illinois prior to May, 1944. A year previous, I was part of the time in Wisconsin and Chicago—or Berwyn—better known as Chicago

(Testimony of Ralph Engel.)

—and part of the time in Western Canada, Edmonton—around Edmonton. I have been in Dawson Creek, in 1943 if I am not mistaken, in the summer. I know the plaintiff, Mr. Dunn. In Dawson Creek I knew he was a Dunn because there were two of them. I wasn't acquainted personally. I know the defendant, Mr. Haugen. I met him first at Dawson Creek the summer of '43. I was at Dawson Creek during the winter of 1944, after the holidays. It would be the first part of 1944. I had two trucks [76] working on that highway, and one was up there and I had to go up and get it and return it—to take it back. At one time, I inquired for the Northern Truck Line office, after someone, I wouldn't remember who it was. It was close in to where they were living at this time. I wouldn't want to be definite about that. I would say the population of Dawson Creek, of a permanent nature, would be roughly around 600. At the time I went there there were many more people, the outside population, scattered on the outskirts of the small town. I would say at that time the Northern Truck Line had their garage five or six blocks from the center of town. I have seen the Dunn trucking garage. I have seen their trucks parked, but I am not definite just what part of the place it was. I would say, without committing myself, it would be five or six blocks from the Northern Truck Lines, or something like that. I was never to their place. I know a man by the name of John Meadors. He is a partner in the Northern Truck Lines. I first

(Testimony of Ralph Engel.)

met him here in Anchorage. I came to Anchorage the first time in May of 1944—26th or 27th—I am not definite—the latter part of May. Mr. Meadors was in Anchorage when I arrived. I believe he left before the 1st of June, just a short time after I was here.

(Witness was handed three instruments.)

Witness continuing:

I received that telegram. That next instrument is a letter dated March 12th. That was written by me to Mr. Haugen. That other instrument is a letter from Dawson Creek, February 22. I have been engaged in the trucking business for years. I believe longer than ten years. And, thereupon,

EARL DUNN

heretofore duly sworn, resumed the stand for further testimony in his own behalf.

Direct Examination

By Mr. McCarrey:

I heard Mr. Miller testify yesterday that he knew me in Dawson Creek. That is correct. I heard Mr. Risley testify he knew me, and [77] Mr. Satter and Mr. Sump. I am acquainted with all of these gentlemen. I contacted with Vern Johnson for to operate a truck on so much a ton for hauling last summer, and he was to receive his pay when I got it, my money from the railroad. I heard Mr. Satter testify that Mr. Johnson said I never paid my bills. My understanding with Mr. Johnson—I paid him

(Testimony of Earl Dunn.)

\$700.00 expense money through the summer, but the bulk of the payment was to be made when I got my final payment from the railroad. Mr. Johnson has been paid in full. The exhibit you hand me is a receipt I received from him when I gave him \$1200.00 for his final payment. It purports to be payment in full for all claims and demands. It was prepared by J. M. McCarrey.

(Paper admitted in evidence as Plaintiff's Exhibit No. 11.)

Witness continuing:

I had paid Mr. Johnson a total of \$1900.00. There was considerable money he owed me. His earnings came to \$2500.00 for the five months. He was out driving one of my cars for a pleasure trip and he smashed the car up so he agreed to pay for a fourth of it. The accident happend in the city, in the late fall of 1945. I got my money from the railroad as a result of the performance of my contract, the 29th of March. I paid him the same day I got the money. It is not true that Mr. Satter's father-in-law, Mr. Oats, had never been paid his money, as Mr. Satter stated on the witness stand. Mr. Oats was in my employ as a sub-contractor. He was to receive his money as soon as I got it from the railroad. I have paid Mr. Oats in full, the 29th of March, the same day as Mr. Johnson's. He cashed the check at the Bank of Alaska. I also had Warren Alfred in my employ. He has been paid.

(Exhibit No. 10 handed to witness for identification.)

(Testimony of Earl Dunn.)

Witness continuing:

That was a copy of the letter that Mr. Edward Davis sent to Chris Haugen of the Northern Truck Lines, endeavoring to obtain settlement of our claim last year. Mr. Davis was employed as my attorney at that time. [78] I requested him to send the letter of which that is a copy. It is dated May 23rd, 1945.

(Letter admitted in evidence and marked Plaintiff's Exhibit No. 10.)

And, thereupon,

J. L. McCARREY, Jr.

being first duly sworn, testified on behalf of the plaintiff as follows:

Direct Examination

My name is J. L. McCarrey, Jr., and I am a practicing attorney here in Anchorage, Alaska, having been in the Territory of Alaska since 1931. On or about the first part of March, 1946, Mr. Warren Alfred came to my office. Mr. Vern Johnson and sometime subsequent thereto, Mr. Joe Oats came to my office, in reference to the settlement of claims which were due and owing from Mr. Dunn to these gentlemen. And in Mr. Dunn's presence they understood that they were to be paid at such time—these claims were paid by Mr. Dunn on or about the 29th day of March, 1946 in my office. And, thereupon, both sides having rested, the following proceedings were had:

Mr. Grigsby: Your Honor please, at this time, the defendant moves the Court to instruct the jury to return a verdict for the defendant, on the grounds there is no evidence to submit to the jury to justify a verdict for the plaintiff.

Now, if your Honor please, the plaintiff has sued, according to the complaint, for the value of equipment, supplies, money and labor furnished in securing certain contracts with the C.A.A. for the defendant, Northern Truck Line Co. All his evidence with relation to any agreement with the Northern Truck Co. is that he formed a partnership—a 50-50 partnership—with the Northern Truck Co. through their representative, Mr. Haugen, a man who had charge of the work for that company in Dawson Creek. But his evidence of any contract whatever, was that they would share 50-50 on all profits from all work that they obtained in Alaska; whether jointly or severally wasn't stated so it was every kind of work.

Now, he has not put in any evidence of any profits pursuant to that contract, or any claim he ever made to the Northern Truck Lines for any [79] share in any profits; but he is, on the contrary, suing for the value of his labor, services, equipment and supplies and money furnished in negotiating contracts. His evidence doesn't substantiate his complaint.

Now, furthermore, he hasn't shown that at any time Mr. Haugen had any authority, during the time he claims he made an agreement with him, to make an agreement of that kind. It is in evidence that Mr. Haugen was in charge of certain trucks

and did hauling with them, and whatever hauling was to be done—probably at that time anybody with a truck, in possession of it, could get hauling—when hauling was desired. But there is no evidence in here of any authority on the part of Mr. Haugen to form a partnership contract between the Northern Truck Lines, Inc., and Mr. Dunn nor to—there is no evidence of any employment other than that.

He has offered no evidence to substantiate the allegations of his complaint. He has sworn that everything that was done was under a partnership contract—share of the profits. There are—we submit there is no evidence to sustain the allegations of the complaint.

Mr. McCarrey: Would the Court like to hear me on that?

Court: Just a moment. Jury may be recalled. Motion will be denied and exception noted as of course.

Mr. Grigsby: I want to add as ground, that Mr. Dunn swears he was a manager of the company during the time these contracts were negotiated, and, therefore, I make the point that a manager couldn't demand compensation for services in negotiating contracts. He has a suit for services as manager.

Whereupon, the Court instructed the jury as follows:

Ladies and Gentlemen of the Jury: You are instructed as follows:

I.

The plaintiff, Earl Dunn, by his complaint in

this action, asserts that the defendant, Northern Truck Line, Inc., is a corporation organized under the laws of the State of North Dakota and doing business in the Territory of Alaska; that between January 1, 1944 and May 15, 1944, at Anchorage, Alaska, the plaintiff, at the special instance and request [80] of defendant and for the benefit of defendant, negotiated certain hauling contracts with the Civil Aeronautics Administration and furnished certain money, labor, equipment and supplies in procuring said contracts all of the reasonable value of \$1500; that the defendant agreed to pay the plaintiff for his labor and for the money, material, equipment and supplies furnished by the plaintiff in the negotiation of such contracts; that the defendant received the gross sum of \$55,425.43 for the hauling performed by the defendant from the Civil Aeronautics Administration, and that by reason of the plaintiff's services and of money advanced and equipment and supplies furnished by the plaintiff in negotiating said contracts the plaintiff became entitled to the sum of \$1500 from the defendant; that plaintiff has repeatedly requested payment of the sum so claimed but that no part of the same has been paid, and the entire sum is now due and owing from the defendant to the plaintiff, with interest at 6% per annum from January 1, 1945.

The defendant in its answer admits that it is a corporation, as stated in plaintiff's complaint, and denies every other allegation of plaintiff's complaint except that defendant admits it received approximately the sum of \$55,425.48 from the Civil Aeronau-

tics Administration for hauling performed by the defendant; and the defendant asks that this action be dismissed, and that it may recover from plaintiff its costs and disbursements incurred in the action.

When you retire to consider of your verdict you will take with you to the jury room the plaintiff's complaint and the defendant's answer, and you may there examine the same in detail.

II.

In this case, as in all civil cases, the burden is upon the plaintiff to prove his case by a preponderance of the evidence only and not, as in criminal cases, beyond reasonable doubt. Preponderance of evidence means the greater weight of evidence. If the evidence in your mind is equally balanced as between the plaintiff and defendant, then the verdict should be for the defendant, because the burden is upon the plaintiff to present evidence of greater weight than in favor of [81] the defendant before plaintiff is entitled to recover.

III.

As indicated above, the burden is upon the plaintiff to prove his case by a preponderance of the evidence. To justify a verdict for the plaintiff it is incumbent upon the plaintiff to prove, by such preponderance of the evidence, the material averments of his complaint, namely, that during, or about, the time mentioned and at the special instance and request of the defendant, and for the benefit of the defendant, the plaintiff performed the services and furnished the money, labor equipment and supplies

of the reasonable value of \$1500; that plaintiff has demanded of defendant payment of said sum and defendant has failed and refused to pay the same or any part thereof. If the plaintiff has proved each and all of the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict should be for the plaintiff in such sum as you find him justly entitled to receive, but not in any event to exceed \$1500. You may, if you think the evidence justifies, find a verdict in favor of the plaintiff and against the defendant for any sum less than \$1500. But if the plaintiff has failed to prove the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict must be for the defendant.

III.-A

If any person request another to perform service or to supply material or equipment, or to loan money, and no price is agreed upon, and no express promise is made for payment, the law implies a promise on the part of the first person to pay the reasonable value of the service or the materials or equipment, as the case may be, and to repay any money so loaned.

The plaintiff has offered testimony to the effect that plaintiff entered into an oral agreement with the defendant, the latter acting by and through the witness Chris Haugen, wherein it was agreed that plaintiff and Haugen should come to Alaska and there seek to obtain trucking contracts for the defendant corporation and that the plaintiff and de-

fendant should share equally in the profits of any contract so obtained; that pursuant to said agreement the defendant secured the contracts which have been introduced in evidence in the trial of this case as Plaintiff's [82] Exhibits Numbers 3 and 4, under which defendant received for the services rendered the gross sum approximating \$55,000; that the defendant, through its president, denied the validity of said contract and refused to acknowledge it in any way; that plaintiff thereafter brought this action to recover the reasonable value of his services and for money advanced and equipment and supplies furnished by the plaintiff in negotiating said contracts. You are the sole judges of the weight and value of such evidence as well as of other evidence admitted in the trial.

In this connection, you are instructed that if the plaintiff's testimony concerning said oral agreement, and the performance of said agreement on his part and the subsequent rejection and denial of the validity of such agreement by the defendant is true, then the plaintiff is by law entitled to recover from the defendant the reasonable value of his services as well as of any money, material or equipment expended or furnished by the plaintiff in negotiating the contracts. The fact, if it be a fact, that the original agreement as claimed by the plaintiff, was in the nature of a partnership would not preclude the plaintiff from recovering compensation for the reasonable value of his services and of equipment and supplies furnished by plaintiff and money advanced by plaintiff in carrying out

said agreement according to his understanding of its terms.

IV.

The law makes you, subject to the limitations of these instructions, the sole judges of the effect and value of evidence addressed to you.

However your power of judging the effect of evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against the declarations of witnesses fewer in number, or against presumption or other evidence satisfying your minds.

A witness wilfully false in one part of his testimony may be distrusted in others. [83]

Testimony of the oral admissions of a party should be viewed with caution.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

Testimony has been introduced concerning the conviction of the plaintiff of certain crimes. Such testimony is admitted only because it may possibly affect or have bearing upon the creditability of the

plaintiff as a witness, and for no other purpose whatever. With respect to this testimony, as with all other testimony, you are, subject to the limitations of these instructions, the sole judges of its weight and value.

Some evidence has been introduced tending to impeach the plaintiff as a witness. To impeach means to cast discredit upon or to impute lack of veracity to any statement or testimony. One of the recognized methods of impeaching a witness is to prove that his general reputation for truth and veracity is bad in the community in which he lives. This must be proved by witnesses who are acquainted with his general reputation in the community in that respect. If you believe from the evidence in this case that plaintiff's general reputation for truth and veracity is bad in the community in which he lives, then you have a right to disregard his testimony as a witness as being unworthy of belief, but you are not bound to so disregard it. It is your duty to weigh the testimony of the plaintiff as well as the impeaching testimony with the utmost care in order to determine whether or not the plaintiff's testimony is true or otherwise. If you believe that the plaintiff, while on the stand, gave a truthful, candid and honest statement of the facts, then you should give his testimony such credit and faith as, in your opinion, it is entitled to despite the impeaching testimony. [84]

V.

The laws of Alaska provide that all questions of

law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the Court, and all discussions of law addressed to the Court; and although the jury has the power to find a general verdict, which includes questions of law as well as fact, you are not to attempt to correct by your verdict what you believe to be errors of law upon the part of the Court.

All questions of fact, other than those heretofore mentioned in these instructions, must be decided by the jury, and all evidence thereon addressed to them. Since the law places upon the Court the duty of deciding what testimony may be admitted in the trial of the case, you should not consider any testimony that may have been offered and rejected by the Court, or admitted and thereafter stricken out by the Court.

You are the sole judges of the credibility of the witnesses. In determining the credit you will give to a witness and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to and feeling for or against any of the parties to the case; the probability or improbability of the statements of such witness; the opportunity he had to observe and be informed as to matters respecting which he gave evidence before you; and the inclination he evinced, in your

judgment, to speak the truth or otherwise as to matters within his knowledge.

VI.

You are to consider these instructions as a whole. It is impossible to cover the entire case with a single instruction, and it is not your province to single out one particular instruction and consider it to the exclusion of the other instructions.

As you have been heretofore instructed, your duty is to determine [85] the facts from the evidence admitted in the case, and to apply to these facts the law as given to you by the Court in these instructions.

During the trial I have made no comment on the facts and expressed no opinion in regard thereto. If I have, or if you think I have, it is your duty to disregard that opinion entirely, because the responsibility for the determination of the facts in this case rests upon you, and upon you alone.

VII.

Upon retiring to the jury room you will elect one of your members as foreman of the jury, who will speak for you and sign the verdict agreed upon. You will take with you to the jury room these instructions, the pleadings in the case, the exhibits and two forms of verdict which have been prepared for your use.

If you find for the plaintiff, your foreman will insert in the appropriate place, the amount which you find the plaintiff is entitled to recover from the defendant, not to exceed the sum of \$1500, together

with interest thereon at the rate of 6% per annum from the date on which you find said debt become due, and you will thereupon insert in the verdict the date on which you so find the debt became due from defendant to plaintiff. Your foreman will thereupon sign the verdict and return the same into Court as your verdict.

If you find for the defendant and against the plaintiff, then your foreman will sign the verdict which has been prepared for that contingency and return the same into Court as your verdict.

The verdict not used will be destroyed by your foreman.

Dated at Anchorage, Alaska, this 17th day of May, 1946.

ANTHONY J. DIMOND,
District Judge. [86]

And thereupon exceptions were taken by counsel for the defendant to the instructions, as follows:

Mr. Grigsby: I except to Instruction No. 3 on the ground that it fails to contemplate the defense in this case, which was that any activities engaged in by the plaintiff with reference to negotiating these contracts was to be compensated for by the employment of the plaintiff and his trucks in the performance of the contract. I except to this part of the instruction as follows:

“To justify a verdict for the plaintiff it is incumbent upon the plaintiff to prove, by such preponderance of the evidence, the material averments of his complaint, namely, that dur-

ing, or about, the time mentioned and at the special instance and request of the defendant, and for the benefit of the defendant, the plaintiff performed the services and furnished the money, labor equipment and supplies of the reasonable value of \$1500; that plaintiff has demanded of defendant payment of said sum and defendant failed and refused to pay the same or any part thereof. If the plaintiff has proved each and all of the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict should be for the plaintiff."

Now, we object to that instruction on the ground that all of the conditions set forth in Instruction 3 might have been complied with—the services might have been performed at the request of the defendant, and they might have been of the value of \$1500, and demand might have been made—but payment might have been according to the contention of the defendant; the consideration might have been the employment of the plaintiff's trucks on the project, and the instruction fails to contemplate that.

Court: Exception will be noted as of course.

Mr. Grigsby: We except to 3-B on the same ground, that it fails to contemplate the defense of the defendant that all compensation to the plaintiff for any connection he had with securing the contracts was to be received by employment of his trucks. You have changed \$75,000 to \$55,000. [87]

Court: Yes, I have.

Mr. Grigsby: Now, your Honor, the complaint alleges that the Northern Truck Line was paid \$55,000 odd gross. This instruction would lead the jury to believe that they made a profit of \$55,000. It is in evidence, I think, the profit was about \$6,000 or \$7,000.

Court: No, it is in evidence that the total they received was fifty-four thousand and some.

Mr. Grigsby: The profit on that was approximately \$6,000.

Court: I can correct that.

Mr. McCarrey: It is not in evidence that it was \$54,000.

Mr. Grigsby: Well, the complaint alleges gross and I don't think it would be fair to have it go to the jury that they made a profit of \$54,000.

Court: Quite right. We don't want to deceive the jury. I will clarify the language by inserting the word "gross". I will say "the gross sum."

Mr. Grigsby: I think that is all.

Court: Exceptions will be noted as of course.

(And thereupon the following proceedings occurred):

Court: Ladies and gentlemen: Counsel for the defendant has pointed out that Instruction 3-B, as formerly read, under which defendant received for the services rendered a sum of approximately \$55,000, that it might be construed to indicate that the Court was instructing you—or suggesting to you—that there was evidence that the defendant made a profit of \$55,000. There was no such testimony. The testimony was that the gross amount received

by the defendant under these contracts was \$7,739.95 on one contract, and \$47,185.99 on another, which would make \$54,900 and some dollars. So I have changed Instruction 3-B and written in so that it reads as follows: [88]

“Under which defendant received for the services rendered the gross sum approximating \$55,000.”

Juror: Judge Dimond, isn't it right that they received about 15c per ton-mile and sub-let at about 12c per ton-mile?

Court: There was some testimony along that line, but I am not prepared to say what it was, and I think if you consult the other jurors you can probably determine just what the testimony was. I remember vaguely 16 and 12, but I think the law would not permit me to tell you what the testimony is.

Counsel may proceed with argument. But first, Court will stand in recess until 4:20.

(Whereupon recess was had at 4:10 o'clock P.M.)

Mr. Grigsby: Your Honor please, I am going to ask permission to re-open the case for the purpose of calling a witness to testify to a matter of which I had no knowledge, which would be proper under a motion for a new trial, for newly discovered evidence, and I suppose perhaps I better ask to have the jury excused.

Court: Oh, I think not. We are so close to it—if we were further away from the conclusion of the

trial—Do you object to putting in additional testimony, Mr. McCarrey? You will have the same opportunity, that is, if Mr. Grigsby brings up anything you wish to rebut.

Mr. McCarrey: Very well, your Honor.

Court: Very well, then. Without objection, the trial will be re-opened and additional testimony may be taken on both sides.

WALTER C. WILLIAMS

heretofore duly sworn, was recalled for further testimony on behalf of defendant, and testified as follows.

Direct Examination

By Mr. Grigsby:

Q. Mr. Williams, you have been sworn. At the time you typed the letter for the plaintiff, Mr. Dunn, that you have testified about, did you have a conversation with him about what he expected to make out of any hauling contracts obtained by himself and the Northern Truck? [89]

A. It was in a discussion. It came about the time we were asking about who should be—or what signature he should put on the letter—and I said: “Are you connected with the Northern Truck Lines, or how do you get your pay? What connection is it?” He said: “Well, I will get my share out of the trucking I do”—put in his trucks and get the share out of the trucking.

Mr. Grigsby: That’s all.

(Testimony of Walter C. Williams.)

Cross Examination

By Mr. McCarrey:

Q. Mr. Williams, did you just walk down the street with counsel here?

A. With Mr. Grigsby?

Q. Yes? A. No, I didn't.

Q. Did you just walk down the street with Mr. Haugen? A. Yes, I did.

Q. Did you have a conversation with Mr. Haugen?

A. Yes, we went over and had a cup of coffee.

Q. What did you discuss, Mr. Williams?

A. I told—where this matter came up, I told Pop Miller that I had mentioned that before, and I wondered why Grigsby didn't ask me.

Q. Did you have any other discussion?

A. At the time we were out, you mean?

Q. Yes.

A. No. We just went over and had a cup of coffee. Mr. Dunn was there.

Q. Who paid for the coffee?

A. I took out the money; I had 15c in change, and so Chris took out a dollar and had it changed.

Q. Were you offered any consideration for testifying as you have now?

A. Absolutely not.

Q. You come back of your own free will and volition? A. That is right.

Q. Without any promises?

A. That is right.

Q. That is all.

(Testimony of Walter C. Williams.)

A. I don't like any infringement on my character. [90]

Mr. McCarrey: That's all.

Court: That is all. You may step down. Any further testimony?

Mr. Grigsby: No, your Honor.

Court: Do you wish to offer any additional testimony, Mr. McCarrey?

Mr. McCarrey: No, sir.

Court: Very well. You may proceed with argument.

Mr. McCarrey: If it please the Court, and with the consent of counsel, I would waive the recording of this argument.

Mr. Grigsby: Very well.

Court: Very well. The reporter may be excused. She may be recalled at any time, if counsel desire.

(At 6:50 P.M. the jury returned to the court room and the following occurred:)

Court: Ladies and gentlemen of the jury, have you agreed upon a verdict?

Foreman: Your Honor, I, Fred A. Sorri, was elected foreman of this jury, and I herewith submit this verdict.

(The verdict was read by the Clerk. It was a verdict for the plaintiff in the sum of \$1500.00, together with interest thereon at the rate of 6% per annum from the 17th day of May, 1946.) [91]

And thereafter on the 21st day of June, 1946 the defendant by order of the Court was granted ninety (90) days from the date of the judgment herein, to-wit, June 11th, 1946, in which to prepare, settle and file its Bill of Exceptions.

And thereafter on the 7th day of September, 1946 it was ordered by the Court that an extension of fifteen (15) days be granted for the filing of a Bill of Exceptions in this cause.

And thereafter on the 26 day of September, 1946, the defendant was granted until October 26th, 1946 in which to file its Bill of Exceptions.

The matters and things hereinabove in this Bill of Exceptions set forth not fully appearing of record, the said defendant, Northern Truck Line, Inc., tenders and presents the foregoing as its Bill of Exceptions in said cause, and prays that the same be settled, allowed, signed and sealed and made a part of the record in said cause by this Court, pursuant to law in such cases.

Dated at Anchorage, Alaska, this 9th day of October, 1946.

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

Service admitted this 7th day of October, 1946.

/s/ J. L. McCARREY, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 9, 1946.

[Endorsed]: Approved and settled and ordered filed January 24, 1947. Anthony J. Dimond, District Judge. [92]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendant above-named, that the foregoing condensed and narrative statement of the testimony introduced at the trial of the above-entitled action is a true, correct and accurate statement thereof.

It is Further Stipulated and Agreed, that said statement and Bill of Exceptions may be approved and settled as the Bill of Exceptions in said cause immediately and without further notice.

Dated at Anchorage, Alaska, this 23rd day of January, 1947.

/s/ J. L. McCARREY, JR.,

Attorney for Plaintiff.

/s/ GEORGE B. GRIGSBY,

Attorney for Defendant.

[Endorsed]: Filed Jan. 24, 1947. [93]

[Title of District Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS

The defendant in the above-entitled action having applied to the Court for an order approving the foregoing Bill of Exceptions in the above-entitled action, and plaintiff and defendant by and through their respective counsel having stipulated that said statement of evidence and Bill of Exceptions is a true, correct and accurate statement of all the testimony introduced in the trial of said cause, and having stipulated that said Bill of Exceptions may

be approved and settled as the Bill of Exceptions in said cause without further notice; and

It further appearing that said Bill of Exceptions contains a condensed and narrative statement of evidence in the cause, and is complete and correct, and said Bill of Exceptions having been heretofore presented to the Court for settlement within the time allowed by law and the rules of this Court, and the Court being fully advised in the premises, it is therefore

Ordered, that the foregoing Bill of Exceptions be, and the same hereby is approved and settled as the Bill of Exceptions in the above-entitled cause upon appeal of the defendant to the United States Circuit Court of Appeals for the Ninth Circuit; and it is

Further Ordered, that this order shall be deemed and taken as a certificate of the undersigned Judge of this Court who presided at the hearing of said cause, and before whom all the evidence in said cause was given; that the [94] said Bill of Exceptions contains a condensed statement in narrative form of all the evidence given in said cause, and upon which the judgment therein is based.

Dated this 24th day of January, 1947.

/s/ ANTHONY J. DIMOND,
Judge.

[Endorsed]: Filed Jan. 24, 1947. [95]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court, Third Division,
Territory of Alaska:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above-entitled cause, and to include in such transcript of record, the following papers of record in said cause, to-wit:

1. Complaint.
2. Answer.
3. Memorandum of Exceptions.
4. Judgment.
5. Petition for Appeal.
6. Assignment of Errors.
7. Order allowing Appeal.
8. Citation on Appeal.
9. Bill of Exceptions.
10. Stipulation of January 24, 1947.
11. Order Settling Bill of Exceptions.
12. This Praecipe.

Respectfully,

/s/ GEORGE B. GRIGSBY,
Attorney for Defendant.

Service Admitted January 31st, 1947.

/s/ J. L. McCARREY, JR.,
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 31, 1947. [96]

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD

United States of America,
Territory of Alaska,
Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed 96 pages, numbered from 1 to 96, inclusive, are a full, true and correct transcript of the records and files of the proceedings in the above entitled cause as the same appears on the records and files in my office; that this transcript is made in accordance with the stipulation for praecipe filed in my office on the 31st day of January, 1947; that the foregoing transcript has been prepared, examined and certified to by me, and that the costs thereof, amounting to \$16.00, has been paid to me by George B. Grigsby, counsel for the appellant herein.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 20th day of February, 1947.

[Seal] /s/ M. E. S. BRUNELLE,

Clerk of the District Court, Territory of Alaska,
Third Division.

[Endorsed]: No. 11561. United States Circuit Court of Appeals for the Ninth Circuit. Northern Truck Line, Inc., a corporation, Appellant, vs. Earl Dunn, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Alaska, Third Division.

Filed March 10, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 11,561

In The

United States Circuit Court of Appeals
For the Ninth Circuit

NORTHERN TRUCK LINE, Inc.,
a corporation,

Appellant

vs.

EARL DUNN,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division

BRIEF FOR APPELLANT

GEORGE B. GRIGSBY,
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Attorney for Appellant.

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Of Counsel.

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No. 11561

In The

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN TRUCK LINE, Inc.,
a corporation,

Appellant

vs.

EARL DUNN,

Appellee.

Upon Appeal from the District Court for the
Territory of Alaska, Third Division

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The Appellee sued the appellant for the sum of \$1500.00 on a quantum meruit for the value of services rendered and money, labor, equipment and supplies furnished by plaintiff to defendant, in negotiating certain contracts between the defendant and the Civil Aeronautics Administra-

tion of the United States. (Transcript of Record, Pages 2, 3 and 4.)

The defendant's answer denies all the allegations of the complaint, except that the corporate capacity of the defendant is admitted. (Transcript of Record, Pages 4 and 5.)

This Court has jurisdiction to entertain the appeal by virtue of the provisions of the Act of Congress of May 31, 1935, 49 Statutes-at-Large 313, which is as follows:

"The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions * * * *

Third, In the district courts for Alaska or any division thereof, and for the Virgin Islands, in all civil cases wherein the value in controversy, exclusive of interest and costs, exceeds \$1000; * * * *"

STATEMENT OF THE CASE

In January, 1944, the plaintiff and one Chris Haugen arrived in Anchorage, Alaska, from Dawson Creek, Canada, where both had been engaged in the trucking business, the latter as a stockholder and acting manager of the defendant corporation. In company with each other they had interviews and negotiations with officials of the Civil Aeronautics Administration of the United States regarding the securing of hauling contracts from that authority for the Northern Truck Line, Inc., the defendant corporation. The negotiations resulted in such contracts being awarded to the defendant. The plaintiff, Dunn, took a very active part in the negotiations, even going so far as to represent himself as the manager of the defendant corporation, and to sign his name as such to bids for contracts, (Transcript of Record, Page 41), all without objection on the part of the said Haugen.

On the trial the plaintiff testified that his services rendered in connection with obtaining the aforesaid contracts were rendered pursuant to a verbal agreement made be-

tween himself and the said Chris Haugen, in Dawson Creek, Canada, in December, 1943; that it was agreed by and between plaintiff and the said Haugen, acting for the defendant corporation, that plaintiff and Haugen would go to Alaska, and there jointly endeavor to secure hauling contracts and jobs for the defendant corporation, the profits from said contracts and all trucking done in Alaska to be divided equally between plaintiff and defendant; that the plaintiff would be an equal partner with the defendant corporation in the trucking business in Alaska. (Transcript of Record, Pages 39, 52 and 53.)

The witness Haugen, testified on behalf of the defendant that the plaintiff's interest in securing the contracts for the defendant was what he would make by the employment of his own trucks on the hauling work—at so much per ton mile. (Transcript of Record, Pages 76 and 77.)

However, although in his complaint plaintiff alleges that the defendant received the sum of \$55,425.48 for hauling it performed for the Civil Aeronautics Administration, he did not sue on the alleged partnership contract but on a quantum meruit, and for the purposes of this appeal and on the assigned errors, it is immaterial whether or not there was a partnership contract or agreement to divide profits. It is enough that there was a substantial conflict of testimony on that issue, which was raised by the evidence and not by the pleadings.

At the conclusion of the testimony, and both sides having rested, the defendant moved the court to instruct the jury to return a verdict for the defendant, said motion being based upon the ground that there was no evidence to submit to the jury to justify a verdict for the plaintiff. (Transcript of Record, Page 115.) This motion was denied, and exception allowed. This ruling is made the basis of Assignment of Error I. Assignment of Error III is based upon exceptions to certain instructions of the Court

The jury returned a verdict for the plaintiff in the sum of \$1500.00 and certain interest and judgment was entered thereon accordingly.

SPECIFICATIONS OF ERROR

The appellant relies upon Assignments of Error I and III, which are as follows:

ASSIGNMENT OF ERROR I

That the Court erred in overruling the motion of the defendant, made at the conclusion of the evidence, that the court direct the jury to return a verdict for the defendant, said motion being based upon the ground that there was insufficient evidence to submit to the jury to justify a verdict for plaintiff, to which ruling defendant excepted and the exception was allowed. (Transcript of Record, Page 11.)

ASSIGNMENT OF ERROR III

That the Court erred in instructing the jury as follows:

“To justify a verdict for the plaintiff it is incumbent upon the plaintiff to prove, by such preponderance of the evidence, the material averments of his complaint namely, that during, or about, the time mentioned and at the special instance and request of the defendant, and for the benefit of the defendant, the plaintiff performed the services and furnished the money, labor, equipment and supplies of the reasonable value of \$1500.00 that plaintiff has demanded of defendant payment of said sum and defendant has failed and refused to pay the same or any part thereof. If the plaintiff has proved each and all of the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict should be for the plaintiff.” (Transcript of Record, Page 12.)

ARGUMENT

ON ASSIGNMENT OF ERROR I

The plaintiff having elected to sue on a quantum meruit the burden was upon the plaintiff to prove the value of his services, and of the equipment and supplies furnished by him in negotiating the contracts on behalf of the defendant with the Civil Aeronautics Administration.

There is not a scintilla of testimony in the record of the value of said services, etc.

Neither the plaintiff nor any witness of the plaintiff has placed, or even attempted to place, any value on the plaintiff's services, nor on the equipment or supplies furnished.

The plaintiff does furnish some testimony which throws some light on what he meant by "equipment and supplies furnished".

He testified on cross examination (Transcript of Record, Page 62), as follows: "By furnishing equipment and procuring contracts, is a motor car which I drove many thousand of miles not equipment? I drove that motor car down here in January. I used that in procuring a contract let in April. What I mean is that I am in so much money in my expenses to Alaska on account of an arrangement that I say I made with Mr. Haugen on behalf of the Northern Truck Line Company. I spent my money because I thought I was a partner."

And on Page 49, Transcript of Record, there is the plaintiff's testimony as to loss of time and expense incurred by him in the summer of 1944, which might possibly be the basis of a damage suit against the man Chris Haugen, or the Northern Truck Line, Inc., for breach of contract.

As to the money advanced, there is the testimony of plaintiff that he loaned Chris Haugen \$75.00 to pay his personal expenses and that part of it was paid back, how much he did not state.

We repeat that there is no evidence whatever in the record from which the jury were justified in placing any specific value on plaintiff's services, nor on the money, supplies and equipment alleged to have been furnished in procuring the contracts.

On the evidence in the record, the jury could as well have found the services, etc., to have been worth \$2500.00, had the complaint so alleged, or any other sum which the complaint might have alleged.

The jury was permitted to infer the value of the services, etc., from the allegations of the complaint and the plaintiff's narration of what the services consisted.

In *Southwestern Arizona Fruit and Irrigation Co. v. Cameron*, 141 Pac. 572, a case very much in point in several respects, the court says:

We know of no principle of law that would authorize a jury, or a court sitting as a jury, in the absence of evidence of value, arbitrarily to find a value. It might be more expeditious to dispense with such proof, and leave the value to be determined by the court or jury from their common knowledge and understanding of values, but the law, in the absence of an agreement between the parties as to the value, insists that it is an issue to be tried * * * it became necessary that evidence on the issue of value under the quantum meruit count be offered before the court would have a basis for a verdict or judgment upon that issue. And that court cites *Thompson on Trials*, Sec. 2606, as follows:

"Where the verdict which the jury return cannot be justified upon any hypothesis presented by the evidence, it ought to be set aside. * * * It would be a verdict without evidence to support it; and it is not

to be tolerated that the jury should assume, in disregard of the law and the evidence, to arbitrate differences of parties, or to decide according to some supposed natural equity, which in reality is merely their own whim."

ARGUMENT

ON ASSIGNMENT OF ERROR III

The instruction complained of under this assignment will for convenience be again set out, as follows: (Transcript of Record, Page 118.)

"To justify a verdict for the plaintiff it is incumbent upon the plaintiff to prove, by such preponderance of the evidence, the material averments of his complaint, namely, that during, or about the time mentioned and at the special instance and request of the defendant, and for the benefit of the defendant, the plaintiff performed the services and furnished the money, labor, equipment and supplies of the reasonable value of \$1500.00; that plaintiff has demanded of defendant payment of said sum and defendant has refused to pay the same or any part thereof. If the plaintiff has proved each and all of the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict should be for the plaintiff in such sum as you find him justly entitled to receive, but not in any event to exceed \$1500.00. You may, if you think the evidence justifies, find a verdict in favor of the plaintiff and against the defendant for any sum less than \$1500.00. But if the plaintiff has failed to prove the material allegations of his complaint, by a fair preponderance of the evidence, then your verdict must be for the defendant."

This instruction is fair on its face. But it must be re-

membered that the plaintiff predicated his right to sue on a quantum meruit, on his testimony to the effect that the services rendered by him to the defendant were rendered pursuant to a partnership agreement, which the defendant repudiated. The plaintiff was not apprised by the complaint of any claim of a partnership agreement.

The instruction complained of fails to take into account that the witness, Haugen, denied any such partnership agreement and testified that the plaintiff's interest in the prospective hauling and freighting was the use of his, the plaintiff's trucks. (Transcript of Record, Pages 76 and 77.)

Haugen is corroborated by the witness, Walter C. Williams, who testified that in March, 1944, he did some typing for the plaintiff. (Transcript of Record, Pages 103 and 104.) Williams was an employee of the Civil Aeronautics Administration. Later in the trial Williams was recalled and testified as follows:

"Q. Mr. Williams you have been sworn. At the time you typed the letter for the plaintiff, Mr. Dunn, that you testified about, did you have a conversation with him about what he expected to make out of any hauling contracts obtained by himself and the Northern Truck?"

"A. It was in a discussion. It came about the time we were asking who should be—or what signature he should put on the letter—and I said 'Are you connected with the Northern Truck Lines, or how do you get your pay? What connection is it?' He said: 'Well, I will get my share out of the trucking I do'—put in his trucks and get the share out of the trucking."

The jury may well have believed this testimony and that

of Haugen and disbelieved that of the plaintiff, who was thoroughly impeached. It is a complete defense to an action on a quantum meruit. True, this defense was not pleaded affirmatively. But defendant's first notice of plaintiff's claim of a partnership contract, and the repudiation thereof, was when plaintiff testified. The instruction complained of completely ignores this defense, which is a complete defense to the action.

Furthermore, the plaintiff is precluded by his testimony from suing on quantum meruit. He testified to an express contract, clear and unequivocal in its terms, which would entitle him to half the profits. If his testimony was true he was as much entitled to recover on this verbal contract, as if it had been reduced to writing. He may have believed that there were no profits made on the Civil Aeronautics Administration contracts, although the evidence is that the defendant received therefrom the gross sum of \$55,425.43. He admitted that he never demanded an accounting of the profits nor his share thereof. He settled for other work on a per ton mile basis. It evidently seemed to him that his best bet was to sue on a quantum meruit, but if his story of the partnership contract and its repudiation by the defendant was pure concoction, as the jury may well have believed, then there was no justification for a resort to that form of action.

In this connection we quote from the opinion in *Carpenter v. Josey Oil Co.*, 26 Fed. (2) 442-444, as follows:

"(3) Quantum meruit refers to that class of obligations imposed by law, without regard to the intention or assent of the parties bound, for reasons dictated by reason and justice. The form of action is contract, but they are not contracts, because the parties do not fix the terms and their intentions are disregarded.* *

* * Further, where the relations of the parties can

be ascertained from an express contract *as explicit as the one at bar, it is not necessary to resort to this legal fiction.* * * * *".

CONCLUSION

We submit that the judgment of the District Court should be reversed on the first error assigned, to-wit, that the court erred in denying the plaintiff's motion for a directed verdict.

It is true that after the motion was made and denied, the case was re-opened, but the evidence subsequently received in no way affected the merits of the motion, and the record is certified by the trial judge to contain all the evidence in the case.

A consideration of the argument made on Assignment of Error III, the giving of the instruction complained of may not be necessary to a decision of this appeal, but we believe the question raised by this assignment should be determined, in view of a probable retrial, in case of reversal.

Dated September 2, 1947.

Respectfully submitted,

GEORGE B. GRIGSBY,
Attorney for Appellant.

E. COKE HILL,
Of Counsel.

No. 11,561

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

NORTHERN TRUCK LINES, INC.,
a corporation,

Appellant,

VS.

EARL DUNN,

Appellee.

Upon Appeal from the District Court of the United States for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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PAUL B. DENKEN, CL

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Appellee.

Upon Appeal from the District Court of the United States for the
Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

STATEMENT.

The Appellee generally accepts the jurisdictional statement and statement of the case submitted by the Appellant and hereby admits that it fairly presents the views and circumstances which give rise to the questions presented in this appeal, with the exceptions that the Appellant has failed to give full credit to the proof of the services rendered by the Appellee to the Appellant in obtaining the contracts for the Appellant, Northern Truck Lines, Inc. The Appellee further states, that the Appellant has tended to minimize the proof of the value of these two contracts obtained

by the Appellee for the Appellant, all of which was so forceably borne out by the evidence of the trial in the lower Court. The Appellee, therefore, wishes to state that it was the Appellee, Mr. Earl Dunn, by his natural ability as a promoter and salesman (Abst. 56), during the months of January, February, March and April of the year 1944, who obtained two very valuable trucking contracts for the Appellant, Northern Truck Lines, Inc., from the Civil Aeronautics Administration at Anchorage, Alaska. (Abst. 25.) One contract, No. 1429, earned a gross income for the Appellant of \$7739.95 and the other, No. 1437, earned a gross income for the Appellant of \$47,185.99, or a total of \$54,929.94. (Abst. 35.)

The Appellee, Mr. Dunn, devoted the greater portion of three months of his time, efforts and services, and in addition he used his equipment and advanced moneys for living costs for himself and part of those of an officer of the Northern Truck Lines, Inc., in obtaining these trucking contracts without any other income than the prospects of sharing in the work and profits of these trucking contracts on a fifty-fifty basis. (Abst. 39, 58 and 62.) The Appellant admitted that the Appellee procured these contracts at the Appellant's request and stated that they were glad to get the contracts. (Abst. 81.)

After the aforementioned contracts had been awarded to the Appellant, Northern Truck Lines, Inc., one Mr. Meadows, who was President of the Northern Truck Lines, Inc., informed the Appellee, Mr. Dunn "They wouldn't need me anymore. It ap-

peared that they got the contracts and that was all they wanted of me." (Abst. 61.) Although Mr. Dunn on several occasions requested officials of the Northern Truck Lines, Inc., for loads, they refused to permit him to participate in the performance of the contracts or to pay the Appellee any of the profits therefrom. (Abst. 48, 49, 53 and 58.)

The Appellant, Northern Truck Lines, Inc., performed the contracts and were paid the sum of \$55,929.94 by the Civil Aeronautics Administration. (Abst. 35.)

The Appellee, as aforesaid, never received any compensation from the Appellant, Northern Truck Lines, Inc., for procuring these valuable contracts nor was he permitted to do any hauling on these contracts with his own trucks. As a result, he was deprived of any compensation for his services, use of his equipment and money advanced in obtaining said contracts.

The Appellant, Northern Truck Lines, Inc., refused to reveal or disclose the profits derived from the performance of the two contracts although oftentimes requested by the Appellee (Abst. 58), and since the Appellant left the Appellee entirely out of the picture by its refusal to disclose the profits or to pay him for his services, the Appellee had no other choice but to sue for the reasonable value of his services and labor used in obtaining these contracts for the Appellant, Northern Truck Lines, Inc.

BRIEF.

I.

Where the performance of a contract by the contractor has been prevented by the other party and the work done up to that time has been done in compliance with the terms of that contract and there is nothing in the contract by which the compensation for the part performed can be determined, the measure of recovery by the party performing that portion of the contract is for the reasonable value of the work, time and the materials furnished.

Jobst v. City of Danville, 212 Ill. App. 523;

Puterbaugh's Common Law Pleadings, 10th Ed., page 169, note 89;

Thorp v. Jackson (Sup. Ct. of Oregon), 165 Pacific 589.

II.

When the Plaintiff does not bring his action upon an express contract but upon the common counts and the Defendant denies the making of the express contract, then the Plaintiff is not confined to the express contract for recovery but may sue upon *quantum meruit* or upon any other ground which he can establish and any evidence which would be competent to establish his cause of action in the absence of an express contract, is competent to prove *quantum meruit*.

Edw. Thompson v. Decker, 200 Ill. App. 179;

Humphreys v. Orrey, 220 Ill. App. 523;

Sessions v. Pacific Improvement Company, 206 Pacific 653;

Thorp v. Jackson, 165 Pacific 589;
Hogan v. Rosenthal, 111 N.Y. Supp. 676;
Baruch v. Giblin, 164 So. 831.

ARGUMENT.

I.

The Appellee based his cause of action upon the oral contract which he made with the Appellant company with the understanding that he was to be paid by participating in the performance of the contracts and fifty per centum of the profits to be earned from the two Civil Aeronautics Administration contracts (Abst. 39, 58 and 62). As was proven from the evidence, the contracts were obtained by the Appellee and once they were secured in the Appellant corporation's name, the Appellant corporation then excluded him from participating in the performance of said trucking contracts or from sharing in the profits derived from the completion of said contracts.

If, under the law, the Appellee were compelled to seek under the terms of the oral contract, it would not be at all unreasonable to believe that the Appellee's compensation would be greatly in excess of the sum of \$1500.00, or the amount which he asked for and recovered in the lower Court. Conformant to practice and procedure provided in such a case the Appellee sued in *quantum meruit* and from the testimony of the defendant in his admission that they were paid the sum of \$55,925.94 by the Civil Aero-

nautics Administration (Abst. 35), the sum of \$1500.00 for the obtaining of such valuable contracts in a cause of action, upon the *quantum meruit* theory, is not unreasonable and because of the gross sum of \$55,925.94 having been paid to the corporation, is proof in itself, of the reasonable value of the services rendered to the corporation by the Appellee in obtaining said contracts.

The Appellee proved that there was an oral contract and under said contract he was entitled to 50% of the profits. (Abst. 39, 58 and 62.) The Appellee further proved the value of said contracts and his services rendered in obtaining the contracts, in that the proof produced at the trial, went to the Jury and Jury found that under the oral agreement which the Appellee had with the Appellant, he was entitled to the reasonable value of his work and services in obtaining the contracts when they rendered a verdict of \$1500.00, or the amount the Appellee sued for, in *quantum meruit*. (Abst. 131.)

The Appellant corporation did not attempt to preclude the Appellee from any type of representation he chose to use in obtaining the contracts which was admitted by Mr. Haugen (Abst. 74, 76 and 81) and the Appellant further admitted that they were glad to obtain the contracts (Abst. 81) but immediately upon the contracts being firmly obtained in the Appellant's name, Northern Truck Lines, Inc., the President, Mr. Meadows, told him that they wouldn't need him anymore (Abst. 61) and whenever the Appellee made requests for loads he was always advised by

Mr. Haugen that he didn't have a load that day (Abst. 48 and 49) yet the Appellant never paid the Appellee for his services in any way whatsoever. Therefore, it was by reason of the breach of the oral contract and the prevention of its performance by the Corporation that the Appellant received absolutely nothing for his services in procuring the Civil Aeronautics Administration contracts and the Appellant corporation was unjustly enriched from the Appellee's personal work and services.

The Appellee after having made several requests of the Appellant and admitted by the defendant's manager, Mr. Haugen (Abst. 114), sued the truck lines upon the *quantum meruit* theory for the reasonable value of his services and equipment used in procuring the trucking contracts. In this respect he proved that his services were performed and the Appellant corporation, by and through its manager, Mr. Haugen, admitted that it was solely through the efforts of the Appellee (Abst. 81) that the contracts were obtained. In spite of the value of these contracts to the Appellant corporation, Northern Truck Lines, Inc., it absolutely refused to pay the Appellee anything for his services rendered.

In this case being considered, the defendant was apprised in advance by the complaint (Abst. 3 and 4) that the plaintiff considered the reasonable value of his services to be worth the sum of \$1500.00 and proved by his own testimony that he came to Alaska from Dawson Creek in January of 1944 (Abst. 37) which was admitted by Mr. Haugen, manager of the

defendant corporation (Abst. 74) and the fact that the contracts were not signed until April 15 as is proven by the date of their execution, discloses that a greater portion of 4 months was used by Mr. Dunn in obtaining them. The Appellant corporation, by the pleadings, were apprised of the demands of the plaintiff and since the Appellant has not taken exceptions upon Appeal as to any irregularities of the trial of the case in the lower Court with the exception as to proof of reasonable value and the instruction of the Court upon the theory of *quantum meruit*, the Appellant was not prejudiced.

The Appellant has cited the case of *Southwestern Arizona Fruit and Irrigation Company v. Cameron*, 141 Pac. 572, as being in point and supporting the theory of the case that the Appellee did not prove the reasonable value of the services rendered to the Appellant by the Appellee. In this respect, we wish to take exception to such interpretation since in that case the facts are that the plaintiff sued in *quantum meruit*, after part performance of the contract and after he had received certain moneys from the defendant. In that case the plaintiff sued in *quantum meruit* and not upon the contract for a balance which he alleged to be due and owing to him under the express contract. In that case the plaintiff failed to prove that there was any balance due under the terms of the contract and naturally he could not recover in any action upon any theory, and therefore, the Court found that there was not sufficient evidence to sustain proof of a balance owing to plaintiff in *quantum meruit* or otherwise.

In the case being considered upon Appeal, the Appellee has proved certain services and bids (Abst. 83), and the contracts themselves and the Appellant has admitted that the Appellee has proved certain services and bids for and on behalf of the Appellant and the Appellant has never paid the Appellee one penny for his services rendered to the Appellant in obtaining these contracts. Therefore, the facts of the case in 141 Pac. 572 are not in point with the present case and should, therefore, be disregarded by the Court wherein the Appellant has cited "We know of no principle of law that would authorize a Jury, or a Court sitting as a Jury in the absence of evidence of value, arbitrarily to find a value." Appellee agrees with the Appellant that the findings of the Court in that case were well founded upon good principles of law but we cannot agree with the Appellant by any stretch of the imagination or conformant to accepted principles of law that the holdings in the *Southwestern Arizona Fruit and Irrigation Co. v. Cameron*, 141 Pac. 572 case is in point or an authority comparable with the case being considered upon appeal, since the facts are not analogous.

ARGUMENT.

II.

The Jury returned a verdict for the exact sum of money as alleged and claimed by the Appellee in his complaint. In a similar case with *Hogan v. Rosenthal*, found in 111 N.Y. Supp. 676, the plaintiff

brought an action for the sum of \$324.31 for the fair and reasonable value of his services rendered to the defendant as a plumber. The Jury returned a verdict for \$300.00 or \$24.31 less than prayed for in the complaint. The defendant brought the defense that he was not to pay more than \$150.00 for the contract. The Jury refused to credit this special defense “* * * and the fact for some reason they did not give the plaintiff the full amount of his unliquidated claim is not a subject for complaint on the part of the defendant” and the verdict was permitted to stand as found in the lower Court. Thus, we can see that it is the Jury who finds the reasonable value of services rendered in an action of *quantum meruit* and not what is alleged in the complaint.

In the present case, the plaintiff alleged the reasonable value of his services to be the sum of \$1500.00. The Jury found after having considered the evidence that his services rendered to the Appellant were worth the sum of \$1500.00.

In 5 *Corpus Juris*, page 141, Section 91, under the title Assumpsit, “Amount of Recovery”, we find the following:

“A recovery of a larger amount than that stipulated in the special contract is not permissible. In no case where the action is for money had and received, goods sold and delivered, *or for work and labor performed*, which, from the nature of the contract itself furnishes the standard of assessment, are the Jury allowed to give more than the amount received, with interest, or the value of the articles delivered, *or the services rendered.*”

Hence, the Appellant's contention that the Jury could have just as easily found \$2500.00 as \$1500.00 cannot be supported by the law or the practice. (See Appellant's Brief.)

Where the Appellant, Northern Truck Lines, Inc., after making an oral agreement with the Appellee, Earl Dunn, to obtain hauling contracts for them and the Appellant repudiates the oral contracts upon which it was agreed that the Appellee and Appellant would share in the division of the work and profits on a 50-50 basis, the action is one of *quantum meruit* and it is competent for the Appellee to produce any evidence to establish the reasonable value of the services.

When the plaintiff does not declare upon an express contract but upon the common counts, if the defendant denies the making of the express contract, then the plaintiff is not confined to the express contract for recovery and he may recover upon *quantum meruit* or any other ground which he can establish and any evidence which would be competent to establish his cause of action in the absence of an express contract, is competent. *Humphreys v. Orrey*, 220 Ill. App. 523.

Sessions v. Pacific Improvement Company, 206 Pacific, page 653. This was a suit brought by a broker for the recovery of commissions for the sale of land and is very much in point with the case now being considered on appeal, in that the plaintiff broker, did considerable ground work in promoting the sale of a tract of land to be used for a shipyard, and after the party whom the plaintiff had been negotiating with over a long period of time had entered into negotia-

tions with the defendant corporations who sold the land, the defendant corporations refused to pay him the commissions agreed upon in his contract. The broker then sued on the contract for \$30,000.00 and also under the common count of assumpsit for \$30,000.00 and the defendant claims that any verdict thereunder is vulnerable because of defects both of pleading and proof.

The lower Court found for the plaintiff and the Appellate Court held that the facts (page 663) "showing prevention of performance justifies an action in assumpsit and, while the broken contract cannot be set up to defeat the implied assumpsit, it is admissible in evidence to show how the cause arose, and to supply a measure of damages", and then cites *Breen v. Roy*, 97 Pac. 170; *Boyd v. Bargogliotti*, 107 Pac. 150; and 5 *Corpus Juris* 1388, paragraph 20, which refers to damages.

The Appellant had ample opportunity to introduce countervailing evidence, but there was no attempt to proffer the same either in the *Sessions v. Pacific Improvement Company* case which is here cited or the case now being considered on Appeal but the Appellant here likewise fails to avail itself of such proof.

The Appellate Court further held in the *Sessions* case (page 663) "He (meaning the plaintiff) was entitled to submit his entire case to the jury for determination upon the facts, and it was the province of the jury to decide which count was supported by the evidence."

In the case now being considered for appeal, the Appellee submitted his entire case *in assumpsit* under *quantum meruit* and asked for reasonable value. However, he proved the 50-50 oral contract which supported the reasonable value of his claim of services and the jury came in with a verdict for the amount claimed as reasonable value of said services in the sum of \$1500.00.

The Appellate Court in the *Sessions* case further held (page 664):

“The jury rendered a general verdict; and, if the evidence adduced on the whole case supports a verdict on either count, the verdict and the judgment entered thereon must stand.”

In this case on appeal, the Appellee urges that since the jury in the lower Court considered all the “evidence adduced on the whole case supports a verdict, which they found in the sum of \$1500.00, that the same verdict ‘must stand’ on appeal.”

Among other points, the Appellate Court in the *Sessions* case found:

“A statement of facts showing prevention of performance justifies an action in *assumpsit*; and, while the broker’s contract cannot be set up to defeat the implied *assumpsit*, it is admissible in evidence to show how the cause arose, and to supply a measure of damages.”

The Court found in the *Sessions* case that the broker may recover *in assumpsit* by showing prevention of performance and also stated the law:

“A broker, who was in fact the primary procuring cause, will not be deprived of his commission merely because negotiations were completed through someone else and even perhaps without the broker having himself having met, or communicated personally with, the buyer.”

“Determination of question of fact by Jury will not be disturbed on appeal. As it is sometimes put in homely phrase in such cases, ‘He who shakes the tree is the one to gather the fruit.’”

The Appellee was prevented in the present case from completing the contract by the Appellant and the Appellant denies that he had authority to make such a contract with the Appellee (Abst. 75) but later on in his testimony the Appellant corporation by and through Chris Haugen, its manager, admitted that he had authority to bind the corporation for Fifty or Sixty Thousand Dollars. (Abst. 85.) As alleged in the statement of facts, the contract was ultimately signed and performed and the Appellant enjoyed the privileges of performing a contract with a gross income of \$55,925.94.

The Court further held in the *Sessions* case:

“Contract employing broker, signed by acting general manager of the corporation, *held* to bind the corporation notwithstanding absence of written authorization to sign contract, since a *de facto* general manager may bind a corporation without express written authority.”

The case now being considered on appeal is analogous to *Sessions v. Pacific Improvement Company*

and can be considered as being on all fours with the case here cited with the exception that the plaintiff broker had a written contract whereas in the case at bar, it was an oral contract.

Now, in the present case, as well as in the case of *Sessions v. Pacific Improvement Company*, it is not necessary that the Appellee sue under the original contract in order to prevail nor can the original contract be set up to defeat the implied assumpsit but it can be considered "to show how the cause arose, and to supply a measure of damages."

Where work and services have been performed under an oral contract, the laborer because of the default of the other party who has received the benefits may treat the contract as abandoned and bring an action under *quantum meruit* and the price for reasonable value of services and labor may be governed to some extent by the stipulations in the abandoned contract. *Edw. Thompson v. Decker*, 200 Ill. App. 179.

In *Puterbaugh's Common Law Pleadings and Practice*, 10th Ed., page 169, we find the following remarks and authorities cited in reference to the theory of *quantum meruit* under the title Assumpsit:

"So where one performs in good faith the services called for by his supposed contract with a municipality which accepts them, it becomes liable under the common counts to pay the reasonable value thereof (*Melluish v. City of Alton*, 230 App. 250), thus, too, recovery may be had on a *quantum meruit* against the estate of a deceased

person for board and nursing furnished in his lifetime, notwithstanding the services were rendered under an agreement that payment would be made therefor by a testamentary provision, where no such provision was made. (*Bross v. Ramsay*, 216 App. 312.) In like manner, where one performed services under an oral contract that they are to be paid for by the conveyance of certain realty, which contract cannot be enforceable because within the statute of frauds, he may recover the value of the realty (*Laymon v. Estate of Francis*, 213 App. 82), and where one performs services upon a parole contract, which, being within the statute of frauds, cannot be enforced, he may recover the value thereof upon a quantum meruit. (*Steel Works v. Atkinson*, 68 Ill. 421; *Folliott v. Hunt*, 21 Ill. 654; *Frazer v. Howe*, 106 Ill. 563; *Laymon v. Estate of Francis*, 213 App. 82.) Where work is fully performed under a special agreement, but not precisely in accordance with the contract, there may be a recovery upon a quantum meruit. (*Taylor v. Renn*, 79 Ill. 181; *Eggleston v. Buck*, 24 Ill. 262.)”

In the case of *Thorp v. Jackson*, 165 Pacific, page 85, heretofore cited:

“The court found on appeal in an action on the quantum meruit against decedent’s administratrix for services rendered decedent as a stenographer, though evidence of a contract between plaintiff and decedent was admissible, the agreement was not indispensable to recovery by the plaintiff, and plaintiff was entitled to have the

jury consider other testimony bearing on the reasonable value of her services.”

The Appellee, by way of explanation of certain moneys had and received by him in the performance of another contract with the Morrison-Knutsen Company (Abst. 22, 23, 43 and 44), wishes to explain that although evidence was produced in the lower Court to establish the 50-50 partnership arrangement by which the Appellee was to perform part of the work and was to receive 50% of the profits is not to be considered in this case but such evidence was introduced to prove that the Appellant, Northern Truck Lines, Inc., did live up to its agreement with the Appellee, Mr. Earl Dunn, in the Morrison-Knutsen contract but absolutely refused the Appellee participation in the performance or to pay him any of the profits in the two large Civil Aeronautics Administration contracts or the basis for which this cause of action was originally brought and is now being appealed. The Morrison-Knutsen contract was an entirely different matter, having been fully performed and has no reference to the case on appeal whatsoever.

The Appellant has appealed upon two assignments of error, the first being that of the failure of the evidence proffered by the plaintiff to support the verdict of the “value of said services” and secondly, that one of the instructions given by the Court “fails to take into account that the witness, Haugen, denied any such partnership * * *” and since “the plaintiff was thoroughly impeached, it is a com-

plete defense to an action on a *quantum meruit*." However, the Appellant admitted that the defense was not pleaded and the Appellee denies that such was proven by the Appellant during the course of trial in the lower Court. The Appellant further states that "The instructions complained of completely ignore this defense, which is a complete defense to the action. Furthermore, the plaintiff is precluded by his testimony from suing on *quantum meruit*."

The Appellee is firmly convinced that the proof of the plaintiff proffered during the course of the trial in the lower Court, supported by arguments one and two, respectively, in this brief completely rebuts such allegations of Appellant and shows that the verdict was fully supported by the evidence.

The Appellee states that the second assignment of error in reference to the instruction given by the Court was properly given and that the Appellant's contention that the "plaintiff is precluded by his testimony from suing on *quantum meruit*," is entirely erroneous and not supported by the law and general practice under Assumpsit and *quantum meruit* principle as the Appellee has proven by his citation of authorities and arguments hereinbefore set forth.

Further the citation by the Appellant of the case of *Carpenter v. Josey Oil Company*, cited at 26 Fed. (2d) 442-444, cannot be conceived to be in point with its contention since in that case the plaintiff had a firm and strongly worded written contract which made

him liable for all risks and defects in tools and casing which is not at all in point with the case now being appealed.

The Court found in the *Carpenter* case that the plaintiff tried to abandon his contract and sue on *quantum meruit*, thus attempting to collect from the defendant for wages, services and materials, indirectly that which he could not obtain or collect directly by his contract. The Court held that the action in such a case was upon the contract only and since he could not collect under the contract, he could not collect upon *quantum meruit*. The Court further found in the *Carpenter* case that "the oil company (defendant) has not been enriched or benefited." Here again that is not the case in our present case since the Appellant, Northern Truck Lines, Inc., were greatly benefited.

CONCLUSION.

The record conclusively shows that the Appellee has produced ample evidence to sustain his case and support the verdict he obtained in the lower Court.

The evidence proves, although denied by Mr. Haugen, that the Appellee brought Mr. Haugen, the manager of the Northern Truck Lines, Inc., to Anchorage in his own car where the contracts were obtained. The evidence shows that the Appellee used his own equipment, expended his own cash and paid his own expenses and those of an official of the Northern Truck Lines, Inc., for a period of some four

months in obtaining the two main contracts for the Northern Truck Lines, Inc., from the Civil Aeronautics Administration and as a matter of fact, the evidence discloses and proves, that it was Earl Dunn, the Appellee, who obtained by his own efforts all of the work which the Northern Truck Lines, Inc., did for the year 1944 and a portion of the year 1945.

The evidence further proves that after the contracts were obtained for the Northern Truck Lines, Inc., that one Mr. Meadows, acting as president of the corporation, came along and completely excluded Mr. Dunn from the work or the profits derived by the corporation in the performance of said contracts and refused to pay the Appellee anything for his efforts. Mr. Meadows further refused to recognize the oral working agreement made by his manager for a division of the profits and work and the agreed distribution of the work, thus depriving the Appellee of any compensation for his services or hauling which would enable the Appellee to make some money for his time and efforts in obtaining the two contracts.

The evidence shows that the Appellant, without permitting the Appellee to participate in the performance of the hauling contracts, completed the two Civil Aeronautics Administration contracts and that the Northern Truck Lines, Inc., were paid the sum of \$55,925.94, without paying one cent to the Appellee for his services. The sum of \$1500.00 is enough to be paid to the Appellee in light of the preponderance of the evidence fully proven.

Appellate Courts are reluctant in overriding the determination of the triers of the fact, especially in their finding of value (*Sessions* case, page 660) of the *quantum meruit* from facts already in the case. Fifty per cent of the money received for the two contracts involved in this case is well worth \$1500.00 as per this verdict as it has been entirely proved.

The fifty per centum of the profits derived from the hauling contracts together with the energy, ingenuity and persistent efforts expended by the Appellee in procuring this work is all amply proven and supports the verdict.

Viewing the case in its entirety we conclude that the plaintiff was both legally and morally entitled to the compensation awarded him for it was through him as the moving cause that the interest which induced the Civil Aeronautics Administration to sign the two contracts and the resulting payment of the sum \$55,925.94 thereon to the Appellant, Northern Truck Lines, Inc.

It was this awakening and the sustained interests by which the Appellee, Earl Dunn, induced the Civil Aeronautics Administration to sign the contracts without any break in continuity until the final consummation thereof which provided the contracts for the Appellant. It was the Appellee who shook the tree, and it would be a miscarriage of justice if he were to be deprived of the fruits of his labor.

We respectfully submit to the Court that no one of the Appellant's assignments of error has any merit; that the case was fully and fairly tried in

accordance with the established rules of practice and procedure and that the judgment of the District Court of the Third Division of the Territory of Alaska should be affirmed.

Dated, Anchorage, Alaska,
March 6, 1948.

Respectfully submitted,
J. L. MCCARREY, JR.,
Attorney for Appellee.

In the
United States Circuit Court
of Appeals
for the
Ninth Circuit

No. 11562

In the Matter of the Application for a Writ of Habeas
Corpus of WARREN ELWOOD, *Appellant,*
v.

TOM SMITH, Superintendent of the Washington State
Penitentiary at Walla Walla, Washington,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION
HONORABLE SAM M. DRIVER, JUDGE

BRIEF OF APPELLEE, TOM SMITH
Superintendent of the Washington State Penitentiary at
Walla Walla, Washington

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BRIEF OF APPELLEE, TOM SMITH

Superintendent of the Washington State Penitentiary at
Walla Walla, Washington

COUNTERSTATEMENT OF THE CASE

This matter is before the court on an appeal from an order entered by the Honorable Sam M. Driver, Judge of the United States District Court for the Eastern District of Washington, Southern Division, denying the appellant's petition for a writ of *habeas corpus*.

In his petition appellant alleges that his imprisonment and present confinement in the state penitentiary at Walla Walla, Washington, following his conviction of the crime of burglary in the second degree and having been adjudicated an habitual criminal, to be illegal upon grounds which appellant summarizes as follows:

"3. That the restraint and imprisonment of the petitioner are illegal, and that the illegality thereof consists in this, to-wit:

A.

"That a warrant issued from the Superior Court of King County accusing petitioner of the crime of being an Habitual Criminal.

B.

"That petitioner was sentenced and committed for the crime of being an Habitual Criminal. The charge of being an Habitual Criminal does not constitute an offense in itself. * * *

"4. That petitioner was held incommunicado in the city prison for twenty-one (21) days, without being allowed the advice or benefit of counsel for a period of five days. Friends or relatives were also denied the right to see petitioner during this time.

"5. That during this 21 day period of time, petitioner was not taken before any Committing Authority or Magistrate as required by Washington Law and Statute. * * *

"6. That police officers entered petitioner's home without a proper warrant and searched and seized certain articles therein; that such action deprived petitioner of his Federal Constitutional rights.

"7. That petitioner was beaten with a rubber hose and hit with the fists of the arresting officers and that petitioner's friend and co-defendant was forced through fear of further violence to sign a confession implicating petitioner after co-defendant's head had been split open with a blackjack and his ribs broken by a blow from one of the arresting officers."
(Tr. 3-4.)

The appellee timely served and filed an answer and return to the petition and order to show cause supported by certified copies of the records of the state trial court (Tr. 6-8) and issues were joined and ready for hearing.

On the 3rd day of December, 1946, appellant's application came on for hearing before the lower court. The appellant took the stand, was sworn and testified in his own behalf and was cross-examined by counsel for appellee. The testimony of his witnesses was likewise taken and his witnesses cross-examined. The deposition of another of appellant's witnesses was later taken and considered by the court. No oral testimony apart from cross-examination of appellant and his witnesses was submitted in support of appellee's answer and return, though eight documents were received in evidence as Appellee's Exhibits 1-8, Inc. (Tr. 71-72.)

Following brief argument on behalf of appellee, the court took the matter under advisement and rendered its decision denying the application of the writ. A formal order of the court denying the application for a writ of *habeas corpus* was thereafter entered on the 3rd day of February, 1947 (Tr. 103-104). Said order recited:

" * * * the judgment and sentence of conviction and the warrant of commitment * * * is hereby declared to be a valid and subsisting judgment and sentence and the warrant of commitment issued pursuant thereto is valid in all respects.

" * * * petitioner's application for a writ of *habeas corpus* be and the same hereby is denied * * * "

It is from that order that appellant has taken and perfected his appeal. Hence, the only question presented on this appeal can be stated as follows: Did the District Court enter an order that was contrary to the preponderance of the evidence and the law applicable thereto?

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS

In paragraph I of the findings of fact (Tr. 100-101) the District Court specifically found that:

"On the 8th day of December, 1936 the petitioner was charged with the crime of burglary in the second degree by an information filed in the Superior Court of the State of Washington for King County in Criminal Cause No. 19175. Thereafter, and on or about the 20th day of February, 1937, the petitioner was convicted by the verdict of a jury of said crime. On the 6th day of March, 1937 the petitioner was accused of being an habitual criminal by a supplemental information filed in the aforesaid court in Cause No. 19175, and on or about the 25th day of May, 1937 petitioner was found to be an habitual criminal by the general verdict of a jury."

In paragraph II of said findings (Tr. 101) the District Court found that:

"On the 6th day of August, 1937 the petitioner, with his counsel, appeared in open court and judgment and sentence were pronounced upon him by the Honorable Chester A. Batchelor, Judge of the Superior Court of the State of Washington for King County. As shown by said judgment and sentence, the petitioner's attorney moved for a new trial following the verdict of the jury finding him guilty of burglary in the second degree. The petitioner appealed from the judgment and sentence as entered, and the supreme court of the State of Washington affirmed the judgment by its opinion in the case of *State v. Elwood*, 193 Wash. 514, 76 P. (2d) 986."

In paragraph III of said findings (Tr. 101), the District Court found that appellant:

"* * * through his attorney, moved to suppress evidence allegedly procured by an unlawful search of his dwelling. The trial court held that the motion was not timely presented, and upon appeal the State Supreme Court affirmed such ruling. That

such search and seizure were not violative of the fourth amendment to the United States Constitution."

In paragraph IV of said findings (Tr. 101-102), the District Court found that appellant:

" * * * if mistreated or abused by arresting or investigating officers, was not induced thereby to confess or make any admissions sufficiently prejudicial to invalidate the judgment of conviction."

In paragraph V of said findings (Tr. 102), the District Court found that:

"The trial court, by oral and written instruction to the jury, protected the petitioner's rights by instructing that any statement made by a codefendant in his absence was not binding upon and could not be considered as evidence against the petitioner who was not present at that time."

Controverting appellant's assertions are the certified copies of verdicts in both the cases, accompanied by certified copies of the minute entries of the clerk of the Superior Court in each case, forming Respondent's Exhibits 1 to 8, inclusive (Tr. 83-99), signed in each instance by the judge before whom the proceedings took place. The recitals in each of the documents are unalterably in opposition to the contentions of the appellant. The District Court was faced with accepting or rejecting the whole of the evidence offered by either of the parties on this question but would have been unable to accept or reject a part only of the evidence submitted by the parties hereto. Either appellant is correct in all particulars and was denied his constitutional rights or the converse is true. There is no possible way in which the conflicting evidence on this point may be reconciled.

It was on the strength of such documentary evidence presented on behalf of the appellee, together with the

presumption of regularity, that attaches to court records, that the court denied the petition. (Tr. 103-104.)

The right of the court to indulge the presumption of regularity of court records and judgment is supported by precedent from almost every jurisdiction.

The court must have been observant of the fact that appellant's conviction of BURGLARY IN THE SECOND DEGREE and habitual criminal proceedings took place in December, 1936, and February of 1937 and that almost ten years later appellant saw fit for the first time to seek redress for claimed violations of his constitutional rights.

"General presumptions in favor of the validity of a particular judgment, and of the jurisdiction of the court to render it, prevail not only in an attempt to impeach such judgment collaterally, but also in a direct attack upon the judgment, whether such direct attack is by appeal or by proceedings other than by appeal. Although there is some authority to the contrary, the general rule in regard to conclusive presumptions of jurisdiction, and of the presence of jurisdictional facts, is also applied in collateral proceedings; in such proceedings, a recital in the record as to the presence of jurisdictional facts may not be impeached or contradicted by evidence outside the record. * * *

"The presumptions in favor of the regularity of a judgment become stronger with the lapse of years. It has even been said that almost any reasonable presumption of fact will be conclusively indulged in order to sustain rights asserted under a decree which is twenty years old." 31 Am. Jur. JUDGMENTS, Paragraphs 422 and 423, page 85.

That the general rule announced in the text authorities is followed in the Federal courts is evident from a reading of the decision in the case of *Bennett v. Hunter* (Cir.) 155 F. (2d) 223, wherein it is said:

"In the absence of a showing of fraud a judgment imports verity and its recitals may not be challenged

in a collateral proceeding by parol testimony. (10 Cir.) 155 F. (2d) 834. * * *

The District Court, having had an opportunity to observe the appellant's demeanor when testifying in his own behalf and to observe the demeanor of his witnesses who testified in his behalf, to measure his prejudice or lack of prejudice in support of his efforts to gain freedom from confinement, and being unable to reconcile appellant's testimony with documentary evidence, was justified in disregarding appellant's testimony in its entirety. *Williams v. Huff*, 140 F. (2d) 867.

THE DISTRICT COURT PROPERLY FOUND THAT
APPELLANT'S RIGHTS HAD NOT
BEEN VIOLATED

The documentary evidence submitted to the court on behalf of the appellee clearly indicates that appellant pleaded not guilty to the charge of burglary in the second degree; that he pleaded not guilty to the charge of being an habitual criminal; that in both instances, the matters were submitted to the jury and the jury returned verdicts (Tr. 85, 89, 91); that appellant was represented by counsel; that an appeal was taken to the Supreme Court of the State of Washington by appellant upon his conviction and that the question of his constitutional rights having been violated was presented to that court and passed upon by that court. (*State vs. Elwood*, 193 Wash. 514, 76 P. (2d) 986); that in said case on the question of whether or not the admissions or confessions of appellant were voluntary or involuntary the supreme court of the State of Washington said:

“ * * * It may well be doubted whether the record shows anything that indicates a confession made by the appellant. But if it should be presumed that there was such a confession, then whether it was produced by duress was a question upon which the evidence was in dispute, and the question was for the jury to determine. *State v. Wilson*, 68 Wash. 464, 123 Pac. 795; *State v. Smythe*, 148 Wash. 65, 268 Pac. 133.” (193 Wash. 514.)

Appellant's allegation that his constitutional rights have been violated is at variance with the inferences that necessarily flow from the recitals in the respective judgments entered by the trial court. The procedure followed in the trial of the appellant, Elwood, up to but not including imposition of judgment and sentence in cause

No. 19175 is one that has the approval of the supreme court of the State of Washington. *In re Towne*, 14 Wn. (2d) 633; 129 P. (2d) 230, wherein it is said at pages 638-639:

“ * * * However, the important factor to be remembered in the determination of the question now under consideration is that the information charging petitioner with being an habitual criminal was filed *after* the return of the verdict finding him guilty of the crime of petit larceny, but *before* the entry of any judgment on that verdict or any other verdict. That order of procedure has been repeatedly approved by this court. *State ex rel. Edelstein v. Huneke*, 138 Wash. 495, 244 Pac. 721; *State ex rel. Edelstein v. Huneke*, 140 Wash. 385, 249 Pac. 784; *State v. Plautz*, 185 Wash. 578, 55 P. (2d) 1057; *State v. Delano*, 189 Wash. 230, 64 P. (2d) 511; *State v. Courser*, 199 Wash. 559, 92 P. (2d) 264.

“ * * * Until such pending charge of being an habitual criminal has been tried out, the court is without power to sentence the defendant for the particular crime of which he has been convicted next before the filing of the habitual criminal charge.
* * * ”

Examination of the complete record supports the conclusion that the prosecution at all times intended to charge appellant with being an habitual criminal. Appellant was first charged on the 8th day of December, 1936, with the crime of burglary in the second degree (Respondent's Ex. 1, Tr. 83) to which he pleaded not guilty. After a trial by jury, the jury rendered its verdict on the 20th day of February, 1937, finding appellant guilty of the crime of burglary in the second degree (Respondent's Ex. 2, Tr. 85). On March 6, 1937, appellant, by information, was accused of being an habitual criminal (Respondent's Ex. 3, Tr. 86 and 87) to which respondent pleaded not guilty and after a trial by jury, appellant was by general verdict on May 25, 1937, found to be an

habitual criminal (Respondent's Ex. 5, Tr. 91). Having in mind the rule in the State of Washington that habitual criminal charges filed after final judgment and sentence for a substantive crime are a nullity (*In re Lombardi*, 13 Wn. (2d) 1, 123 Pac. 764), the unusual procedure of rendering judgment without imposing sentence would, of itself, indicate that further proceedings were to take place and if habitual criminal charges were not to be filed, then there would have been no barrier to imposing the sentence and rendering a complete and final judgment at that time. If, on the other hand, habitual criminal charges were being prepared for future filing, the prosecution would have been unable to file them if a final judgment and sentence was entered in Cause No. 19175, for such a charge would then have been a nullity. *In re Lombardi, supra*.

Not only was there a total failure of proof on the question of violation of appellant's constitutional rights, but apart from any questions of proof the allegations in the petition on this point are in irreconcilable conflict with the documentary evidence of what transpired at the respective hearings in December, 1936, and in the early part of the year 1937. If the records of the trial court are to be relied upon, then it must be deemed established that the appellant's constitutional rights were at all times protected. Appellant entered pleas of not guilty to the information charging the crime of burglary in the second degree, and not guilty to the supplemental information charging appellant with being an habitual criminal. In both instances appellant had counsel and the matter was submitted to a jury for determination as to the guilt or innocence of the appellant. Verdicts were rendered by a

jury in both cases—in the first case finding the defendant guilty of the crime of burglary in the second degree, and in the second case by a general verdict finding the defendant to be an habitual criminal. The record in this case indicates that appellant at all times was accorded all of the rights and privileges guaranteed to him under the Constitution of the United States and the State of Washington and of the laws of the State of Washington.

THE DISTRICT COURT PROPERLY FOUND APPELLANT'S CONFINEMENT TO BE PURSUANT TO A VALID JUDGMENT AND SENTENCE

Appellant challenges the right of the courts of the State of Washington to enter a valid judgment and sentence for the crime of burglary in the second degree following a verdict of the jury finding appellant guilty of being an habitual criminal which under state laws makes mandatory the imposition of a life sentence for the substantive crime. The laws of the State of Washington relating to Habitual Criminals state:

“ * * *

“Every person convicted in this state of * * * any felony, who shall previously have been twice convicted, whether in this state or elsewhere, of any crime which under the laws of this state would amount to a felony * * * shall be punished by imprisonment in the state penitentiary for life.” (Sec. 2286, Rem. Rev. Stat., Laws of Washington.)

The record indicates that after the appellant was found guilty, by a jury, of the crime of burglary in the second degree, a supplemental information was filed charging the appellant with being an Habitual Criminal. Pursuant to the provisions of the statute, the charge of being an Habitual Criminal was submitted to the jury who had the right to find whether or not appellant had any prior convictions. The question of prior conviction is an issue of fact in Washington. *State v. Furth*, 5 Wn. (2d) 1; 104 P. (2d) 925.

The severer penalty provided for an Habitual Criminal is imposed for the last offense. The charge of being an Habitual Criminal is not for a separate offense. *State v. Domanski*, 5 Wn. (2d) 686; 106 P. (2d) 591.

The Habitual Criminal statute of the State of Washington has been construed by the Supreme Court of the State of Washington and as stated by the Ninth Circuit Court of Appeals in the case of *Skaug v. Sheehy*, 157 F. (2d) 714, on page 715:

“ * * * No principle is better settled than that the construction of a state statute or provision of its constitution is a state question, the final decision of which rests with the courts of the state. Cf. *Hebert v. State of Louisiana*, 272 U. S. 312, 316, 47 S. Ct. 103, 71 L. Ed. 270, 48 A. L. R. 102. * * * ”

In the case of *Henry v. Webb*, 21 Wn. (2d) 283; 150 P. (2d) 693, the court said:

“An accused convicted of burglary in the second degree, and thereafter charged with being and found to be an habitual criminal by reason of other crimes amounting to felonies under the statutes of Washington, must be sentenced to imprisonment in the state penitentiary for life.”

The appellant was not sentenced to life imprisonment for the crime of being an Habitual Criminal but was sentenced to life for the crime of burglary in the second degree. It is true the sentence was imposed after the return of a jury verdict finding the defendant to be an Habitual Criminal. Such procedure is followed in the State of Washington. (*Ex parte Cress*, 13 Wn. (2d) 7; 123 P. (2d) 767) and under the circumstances involved herein the life sentence was mandatory.

ARGUMENT IN ANSWER TO APPELLANT'S BRIEF

For convenience in presenting our arguments in opposition to the assignments of error set forth in appellant's brief, we will follow the procedure of setting forth the individual assignment of error in the same language as that employed by the appellant, followed by our argument.

"1. The Court Erred in That It Did Not Consider Question No. 3, A-B, of Petitioner's Petition. The State Supreme Court Has Ruled in Numerous Decisions That It Is Not a Crime To Be an Habitual Criminal. The State Court Issued a Warrant of Arrest Charging a Crime Where No Crime Exists. The Judgment and Sentence, Therefore, Are Void."

In his brief appellant contends that the District Court erred because it did not consider question No. 3, A-B, of petitioner's petition. In his argument to substantiate his contention appellant overlooks the fact that his sentence and judgment was not on the crime of being an Habitual Criminal but on the conviction and sentencing of being guilty of the crime of burglary in the second degree. The laws of the State of Washington requiring that a person convicted of a felony and who has twice before been convicted of crimes which would constitute a felony in the State of Washington, shall be sentenced to the state penitentiary for life on the substantive crime. (Sec. 2286, Rem. Rev. Stat., Laws of Washington.) The appellant filed his application for a writ of *habeas corpus*. An order to show cause was issued and the appellee filed his answer and return to the petition and order. Thereupon the District Court proceeded to adjudicate the petitioner's right to the writ upon the allegations of his petition. The case was disposed of by according to the appellant every

opportunity to be heard on any matter affecting his petition as though the writ had issued. Not only were the issues formally drawn but the petitioner was personally present in court (Tr. 16). When asked if he was ready to proceed with his application, he replied in the affirmative (Tr. 22). He was then asked if he had any witnesses or if he desired to call any witnesses and to both such questions his response was in the affirmative (Tr. 26). Thereafter, he was sworn and testified in support of his application, was cross-examined by counsel for appellee (Tr. 52-69) and had certain documents marked "Petitioner's Exhibits 1 and 2" (Tr. 70), admitted in evidence. The appellee offered in evidence eight documents which were received in evidence without objection by appellant (Tr. 71-72). The appellant called his witnesses and examined them (Tr. 28-30; 31-51). Appellant's witnesses were cross-examined by counsel for appellee (Tr. 30-31; 51-52). Thereafter, the case was taken under advisement and the appellant given an opportunity to have a deposition taken of one of his witnesses, which deposition was later filed (Tr. 76-81).

"It is well settled that the purpose and function of a proceeding in habeas corpus is to determine the question whether a person is being unlawfully detained, * * *"

Macomber v. Hudspeth, 115 F. (2d), 114 at page 116.

"Whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the state. The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable this court to revise the decisions of the state courts on questions of state law."

Hebert v. State of Louisiana, 47 S. Ct., 103 at page 104.

The Federal District Court could not in a *habeas corpus* proceeding review errors of a state court in the admission or rejection of testimony or the sufficiency of the evidence to support applicant's conviction for burglary in the second degree. *Wright v. Brady*, 129 F. (2d) 109.

In the case of *United States ex rel. Jackson v. Brady*, reported in 133 F. (2d) 476, at page 481, the court in speaking about the right of petitioner to raise constitutional questions for the first time said:

"Surely, such a request should not be granted on the petition of a defendant in the state court who has had full opportunity to raise his objection during his trial in that tribunal but has failed to do so.
* * * "

Where a careful examination of the record discloses, as in this case, that there was sufficient evidence to support the conclusion of the District Court that the petition should be denied, the judgment or order of dismissal must be sustained on appeal. *Williams v. Dowd*, 153 F. (2d) 328.

In the case of *United States ex rel. Bongiorno v. Regan*, 146 F. (2d) 349, at page 351, the court said:

"First. We may not review in a *habeas corpus* proceeding errors of law committed by the courts of Illinois. (Citing cases.)

"Secondly, whether there was evidence to support the verdict involves the guilt or innocence of the appellant with which on *habeas corpus* we are not concerned. As Justice Holmes said in *Moore v. Dempsey*, supra: '* * * What we have to deal with is not the petitioner's innocence or guilt but solely the question whether their constitutional rights have been preserved.' "

"2. The Court Erred in That It Did Not Invoke the Power Granted by *Brown vs. Mississippi*, 56 S. Ct. R. 461; 297 U. S. 278; 80 L. Ed. 682, *Johnson vs. Zerbch*, 304 U. S. 458; *Herbert vs. Louisiana*, 272 U. S. 312, 47 S. Ct. R. 103. In Questions Raised in Nos. 4-5-6-7, and to Fail to Afford Corrective Judicial Process to Remedy a Wrong, to Apply the Federal Rule to a Case of Law Arising Under 28 U. S. C. 453, as Being in Custody in Violation of the Constitution or of a Law or Treaty of the United States, and Under 28 U. S. C. 41 (14) as a Suit Authorized by Law To Be Brought by Any Person to Redress the Deprivation, Under Color of Any Law, Statute, Regulation, Custom or Usage, of Any State, of Any Right, Privilege or Immunity, Secured by Any Law of the United States or of All Persons Within the Jurisdiction of the United States."

The record of the proceedings of the hearing upon the order to show cause discloses that the court did not rely solely upon the answer and return of this appellee in formulating its findings of fact and conclusions of law.

The District Court was under no obligation to accept as correct any of the evidence submitted by appellant in support of his pleadings and could have disbelieved or disregarded any or all of appellant's testimony even though there was no rebutting evidence.

"* * * Appellant is, of course, a biased witness and in the ordinary habeas corpus case the court would be entitled to disbelieve such testimony even in the absence of rebutting evidence." *Williams v. Huff*, 146 F. (2d) 867, 868.

On the other hand, the court could, as it evidently did, accept the documentary evidence adduced on behalf of this appellee as the basis for its findings and conclusions, disregarding as untrue or immaterial any or all of appellant's testimony. In any event, the record establishes that there was ample evidence upon which the court below could base its findings and conclusions apart from the answer and return filed by the appellee.

CONCLUSION

The District Court properly found that this appellant was represented by counsel both in the hearing on the charge of the crime of burglary in the second degree, and on the charge of being an Habitual Criminal. In both instances the appellant entered his plea of not guilty and a jury by its verdict found appellant guilty of the crime of burglary in the second degree, and found the appellant guilty on the charge with being an Habitual Criminal. The court had jurisdiction to enter the judgment of conviction and sentence which was imposed and which forms the basis for appellant's present confinement. An examination of the record herein clearly shows that the order of the lower court denying the petition upon the ground that the petitioner had not by a preponderance of the evidence proved the allegations contained in the petition was clearly authorized. The District Court properly found that appellant's constitutional rights had not been violated and that he had been accorded all of the rights, and privileges guaranteed to him by the Federal constitution, the state constitution and by the Laws of the State of Washington.

The judgment of the court below should be affirmed.

Respectfully submitted,

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No. 11563

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE
NINTH CIRCUIT

JAMES M. GORDON,

Appellant,

VS.

KENYON J. SCUDDER, Superintendent
of the California Institution for Men.
Located at Chino, California,

Appellee.

APPELLEE'S BRIEF

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No. 11563

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

for the

NINTH CIRCUIT

JAMES M. GORDON,

Appellant,

v.

KENYON J. SCUDDER, Superintendent
of the California Institution for Men.
Located at Chino, California,

Appellee.

APPELLEE'S BRIEF

STATEMENT OF CASE

James M. Gordon, appellant, and Harry White were indicted on the fourteenth day of March, 1944, by the Los Angeles County Grand Jury and accused in Count one of conspiracy to cheat and defraud by criminal means and to obtain money and property by false pretenses and by false promises with fraudulent intent not to perform such promises, and to commit grand theft. In Counts Two to Eight inclusive, they were accused of the substantive offenses

of grand theft. The jury found them guilty on all counts. White was placed on probation and appellant was sentenced to imprisonment in the state prison for the term prescribed by law, the sentences on the grand theft counts were ordered to run concurrently but consecutively with the sentence on the conspiracy count (R. 31, 32).

An appeal was taken by James M. Gordon from the judgments of conviction to the District Court of Appeal, Second Appellate District of the State of California, which affirmed the convictions on all counts. (R. 32; *People v. Gordon*, 71 Cal. App. (2d) 606, 163 P. 2d 110.) A rehearing was denied and a hearing by the Supreme Court of California was also denied. (R. 5.)

A motion was made in the said district court of appeal to recall its remittitur, which was denied, and the Supreme Court of California denied a hearing on said motion. (R. 5, 6.)

An application for a writ of habeas corpus was filed with the Supreme Court of California, which was denied without opinion. (R. 7.)

An application for a writ of habeas corpus was filed with the District Court of the United States in and for the Northern District of California, which was denied, and the issuance of an order to show cause why a writ of habeas corpus should not issue was also denied. (R. 30.) An application for a certificate of probable cause for appeal was denied by said court

(R. 90), and a like application was denied by Honorable William Denman, Judge of the United States Circuit Court of Appeals, Ninth Circuit. (R. 96; *Application of Gordon*, 157 F. 2d 659.)

An application for a writ of habeas corpus, allegedly upon the same grounds set forth in the application filed with the District Court of the United States in and for the Northern District of California, was filed with the District Court of the United States in and for the Southern District of California (R. 30), following the removal of James M. Gordon from San Quentin Prison, Marin County, California, to the Institution for Men at Chino, San Bernardino County, California. (R. 2, 29, 96.)

An order to show cause was issued why a writ of habeas corpus as prayed for should not issue. (R. 87.) After the matter was duly and regularly heard and fully presented by the filing of points and authorities and oral argument, the court rendered a memorandum of conclusions and made an order discharging the order to show cause and denying the application for a writ of habeas corpus. (R. 93, 95, 97.) An application for a certificate of probable cause for appeal was denied by said court (R. 106), but granted by Honorable Albert Lee Stephens, Judge of the United States Circuit Court of Appeals for the Ninth Circuit. (R. 109, 110.) An appeal was then taken from the order denying the issuance of a writ of habeas corpus and discharging the order to show cause. (R. 107.)

QUESTION PRESENTED

Did the lower court abuse its discretion in discharging the order to show cause and denying the issuance of a writ of habeas corpus?

SUMMARY OF ARGUMENT

1. The fact that the Supreme Court of the State of California denied appellant's application for a writ of habeas corpus without rendering an opinion was not a good, sufficient or legal reason for the filing of a similar application with the United States District Court without first seeking a review by the Supreme Court of the United States, unless the alleged facts showed a case of peculiar urgency why the writ should issue by a federal court.

2. The constitutional or statutory right of appeal, guaranteed by the Fourteenth Amendment of the Constitution of the United States, is not denied because an appellate court in its decision affirming the judgment ignores, distorts or misstates the evidence.

3. Appellant's petition for a writ of habeas corpus filed with the Supreme Court of California is without averment that Section 182 of the Penal Code, defining criminal conspiracy, is unconstitutional and void as violative of any provision of the federal Constitution. (R. 42.)

4. The allegation in appellant's petition for a writ of habeas corpus filed with the Supreme Court of

California, "That the trial court did not have jurisdiction to impose a judgment of imprisonment on the conspiracy count in that there was no proof of the existence of a conspiracy within three years of the return of the indictment" presented no federal question. (R. 46.)

5. The introduction of evidence tending to show the commission by appellant of other offenses of which he was not accused did not breach the Fourteenth Amendment of the Constitution of the United States. (R. 48.)

ARGUMENT

I

A. Exhaustion of State Remedies.

The rule is that an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in the Supreme Court of the United States by appeal or writ of certiorari, have been exhausted.

Ex parte Hawk, 321 U. S. 114, 64 S. Ct. 448, 450;

White v. Ragen, 324 U. S. 762, 65 S. Ct. 978, 981.

An exception to the above rule is where the decision of the state court is that the remedy of habeas corpus is not available under the state practice, or its decision is based upon some other adequate non-federal ground. In such cases it is unnecessary for

the petitioner to ask the Supreme Court of the United States for certiorari in order to exhaust his state remedies, since that court would lack jurisdiction to review the decision of the state court and the denial of certiorari would not preclude a district court from inquiring into the federal question presented to, but not considered by, the state court.

White v. Ragen, 324 U. S. 762, 65 S. Ct. 978, 981;
Woods v. Nierstheimer, 328 U. S. 211, 66 S. Ct. 996, 998.

But where habeas corpus is available under the state practice and the petition is based upon state and federal grounds and is denied by the state court without opinion and it appears from an examination of the record that the state grounds are insubstantial, it will be presumed that the state court based its judgment on the law raising the federal question, and the Supreme Court of the United States will take jurisdiction.

Williams v. Kaiser, 323 U. S. 471, 65 S. Ct. 363, 367.

Another exception to the above rule is in cases of peculiar urgency, such as cases “involving the authority and operations of the general government, or the obligations of this country to, or its relations with, foreign nations.” In cases where peculiar urgency is not shown to exist why the writ should issue, the federal courts will generally leave the petitioner, after a final determination of the case by the state court, to his remedy by writ of error from the

Supreme Court of the United States because of the exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court, and subject to its laws, may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state, and finally discharged therefrom.

Urquhart v. Brown, 205 U. S. 179, 27 S. Ct. 459, 460;

See, *Ex parte Melendez*, 98 F. 2d 791, 792;

Kramer v. State of Nevada, 122 F. 2d 417, 419;

In re Miller, 126 F. 2d 826;

Makowski v. Benson, 158 F. 2d 158.

The remedy of habeas corpus is available in the State of California for the protection and enforcement of constitutional rights even where questions of fact are raised by the petition. In such cases a referee is appointed by the Supreme Court of California to take evidence and submit findings.

In re Ward, 28 A. C. 595, 170 Pac. 2d 665;

In re Marvich, 27 Cal. (2d) 503, 165 Pac. 2d 241;

In re Mooney, 10 Cal. (2d) 1, 15, 73 Pac. 2d 554, 561.

That the state grounds urged by appellant in his petition for a writ of habeas corpus filed with the Supreme Court of California are insubstantial clearly appears from the petition and the points and authorities filed therewith. We shall discuss these matters later under Points III and IV.

B. Habeas Corpus Cannot be Employed as Substitute for Writ of Error

The question for determination upon this writ is simply one of jurisdiction and it cannot perform the function of a writ of error.

Felts v. Murphy, 201 U. S. 123, 26 S. Ct. 366, 368;

Burall v. Johnson, 134 F. 2d 614;

Application of Gordon, 157 F. 2d 659.

If the state court had jurisdiction to try the case, and had jurisdiction over the person of the accused, and never lost jurisdiction, an application for a writ of habeas corpus is properly denied. A writ of this nature cannot perform the function of a writ of error.

Valentina v. Mercer, 201 U. S. 131, 26 S. Ct. 368, 370.

Habeas corpus proceedings are confined to the examination of fundamental and jurisdictional questions, and the writ cannot be employed as a substitute for a writ of error.

Collins v. Johnston, 237 U. S. 502, 35 S. Ct. 649, 651.

Even though the federal court may disagree with the state court over the sufficiency of the evidence, no relief can be given for two reasons; first, the federal court may not review in a habeas corpus proceedings errors of law committed by the state court; secondly whether there was evidence to support the verdict involves the guilt or innocence of the accused, with

which on habeas corpus the federal courts are not concerned.

United States v. Ragen, 146 F. 2d 349, 351.

In *Ex parte Quirin*, 317 U. S. 1, 63 S. Ct. 2, 9, it is stated:

“While it is the usual procedure on an application for a writ of habeas corpus in the federal courts for the court to issue the writ and on the return to hear and dispose of the case, it may without issuing the writ consider and determine whether the facts alleged by the petition, if proved, would warrant discharge of the prisoner.
* * *”

II

RIGHT OF APPEAL

The constitutional or statutory right of appeal, guaranteed by the due process clause of the Fourteenth Amendment of the Federal Constitution (*Frank v. Mangum*, 237 U. S. 309, 35 S. Ct. 582, 587), is not denied because an appellate court in its decision affirming the judgment ignores, distorts or misstates the evidence.

A state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.

Ex parte Converse, 137 U. S. 624, 11 S. Ct. 191, 193.

Where the accused receives a fair and impartial trial in a court of competent jurisdiction, whose jurisdiction was never lost or disturbed at any stage of the proceedings, that is due process.

United States v. Ragen, 146 F. 2d 349, 351,
Certiorari denied, 65 S. Ct. 1194.

The Constitution of the United States does not guarantee that the decision of state courts shall be free from error.

Worcester County Trust Co. v. Riley, 302 U. S.
292, 58 S. Ct. 185, 188.

When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the Fourteenth Amendment of the Constitution of the United States.

Central Land Co. of West Virginia v. Laidley,
159 U. S. 103, 16 S. Ct. 80, 83.

Federal courts do not sit to review the finding of facts made in the state court, but accept the findings of the court of the state upon matters of fact as conclusive and confine their review to questions of federal law within the jurisdiction conferred upon them.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86,
29 S. Ct. 220, 221.

In *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies*, 312 U. S. 287, 61 S. Ct. 552, the Supreme Court of the United States, at page 555, said:

“* * * The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. * * *”

In the *Application of Gordon*, 157 F. 2d 659, 660, it is said:

“* * * In respect to the grand theft counts, the prisoner maintains that on his appeal to the District Court of Appeal for the State of California that court, in its opinion, misstated the facts and so decided the case improperly. Since, however, the facts so misstated supported the legal points held by the California District Court of Appeal, the Supreme Court of the State of California refused to grant a hearing under its rule that a hearing after a decision by the District Court of Appeal would be granted only if the law there expressed was incorrect as applied to the facts as set forth in the opinion. *People v. Davis*, 147 Cal. 346, 81 P. 718. This statement, if correct, indicates no more than error in the course of appeal. * * *”

III

PENAL CODE SECTION 182

In appellant's petition for a writ of habeas corpus filed with the Supreme Court of the State of California it is alleged that Section 182 of the Penal

Code is unconstitutional and void in that it does not contain a definition of the clause “to cheat and defraud any person of any property, by any means which are in themselves criminal” nor does it establish the elements constituting such crime; and is vague and uncertain. It is also alleged that the judgment of conviction on the conspiracy count was and is void in that the verdict of the jury does not disclose whether defendant was found guilty of a conspiracy to cheat and defraud by means which are in themselves criminal, or a conspiracy to obtain money or property by false pretenses, or of a conspiracy to obtain money or property by false promises with fraudulent intent not to perform such promises, or of a conspiracy to commit grand theft. (R. 42.) *In re Bell*, 19 Cal. (2d) 488, *In re Peppers*, 189 Cal. 682, and *People v. Pace*, 73 Cal. App. 548, were cited by appellant in support of said contentions. (R. 60.)

From an examination of the opinion of the District Court of Appeal, Second Appellate District, of the State of California, rendered on the appeal (*People v. Gordon*, 71 Cal. App. (2d) 606; 163 Pac. 2d 110, it appears that no contention was made that Section 182 of the Penal Code was unconstitutional, but that it was contended that the indictment failed to charge a public offense in that it does not conform with the provisions of Sections 950, 951 and 952 of the Penal Code and that if such sections have been complied with they are unconstitutional in that appellant has been denied due process of law guaranteed

by the Fourteenth Amendment of the Federal Constitution, and California Constitution, Article I, Section 13.

Since the validity of Section 182 of the Penal Code was presented to the Supreme Court of the State of California by habeas corpus, it was unnecessary for the Supreme Court in such proceeding to consider whether said clause in said code section was unconstitutional because of uncertainty or vagueness or otherwise. This clearly appears from the ruling of the Supreme Court in the matter of *Bell*, supra, 19 Cal. (2d) 488; 122 Pac. 2d 22. In that matter it was held (page 505) that,

“Because petitioners have failed to sustain the burden of proving that they were not convicted of one valid provision of the ordinance prohibiting acts of violence, the writ heretofore issued is discharged and the petitioners are remanded to the custody of the sheriff of Yuba County.”

If the constitutional question presented in the instant case had been raised on appeal, then the court, in the event said clause was held unconstitutional, could have reversed the judgment on that count and ordered a new trial without discharging appellant from custody or affecting his conviction on other counts predicated upon valid statutes.

It is thus apparent that this state ground was and is insubstantial.

IV

EXISTENCE OF CONSPIRACY

The allegation in the petition for a writ of habeas filed with the Supreme Court of California, that the trial court did not have jurisdiction to impose a judgment of imprisonment on the conspiracy count in that there was no proof of the existence of a conspiracy within three years of the return of the indictment (R. 46), presented no federal question. It was a matter solely for decision on the appeal by the state courts. The District Court of Appeal said: (*People v. Gordon*, 71 Cal. App. (2d) 606, 629)

“* * * It is true that the evidence does not show that all of the fraudulent acts were within three years from the return date of the indictment, but such showing is not essential to the competency of the evidence. A conspiracy may be proved by evidence of its gradual formation, of acts which occurred long anterior to the criminal compact. (Citing authority) Therefore the sales to Conger, Wastlund and the Winstons more than three years prior to the indictment were evidence of the conspiracy.”

From the narration of the evidence set forth in the opinion of the said District Court of Appeal, it is reasonable to conclude that the court found that the conspiracy existed within three years of the return of the indictment. Therefore, this matter was and is insubstantial.

OTHER OFFENSES

The allegation in the petition for a writ of habeas corpus filed with the Supreme Court of California, that defendant James M. Gordon was denied his constitutional right to a fair and impartial trial guaranteed by the Fourteenth Amendment in that the trial court, over objections, permitted the introduction of evidence tending to show the commission by defendant of offenses of which he was not accused, lacked all semblance of merit. (R. 48.)

In *Lisenba v. People of State of California*, 314 U. S. 219, 62 S. Ct. 280, it is stated at page 286:

“Testimony was admitted concerning the death of James’ former wife, on the widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system. The Fourteenth Amendment leaves California free to adopt a rule of relevance which the court below holds was applied here in accordance with the State’s law.”

The District Court of Appeals of California upheld the introduction of such evidence on the grounds that it showed intent, plan and scheme to defraud, and knowledge of the falsity of the representations made to the vendees named in the accusation. (*People v. Gordon*, 71 Cal. App. (2d) 606, 632.)

CONCLUSION

For the foregoing reasons the District Court of the United States did not abuse its discretion in discharging the order to show cause and denying the issuance of a writ of habeas corpus.

Respectfully submitted,

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No. 11563

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES M. GORDON,

Appellant,

vs.

KENYON J. SCUDDER, Superintendent of the California
Institution for Men Located at Chino, California,

Appellee.

APPELLANT'S CLOSING BRIEF.

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FILED

JUN 14 1947

PAUL P. O'BRIEN

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No. 11563
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JAMES M. GORDON,

Appellant,

vs.

KENYON J. SCUDDER, Superintendent of the California
Institution for Men Located at Chino, California,

Appellee.

APPELLANT'S CLOSING BRIEF.

PRELIMINARY STATEMENT IN RESPONSE
TO APPELLEE'S BRIEF.

It will be noted that appellee's "Statement of Case" is confined to a chronology of the history of the case through the State and the Federal courts. It is significant that he does not assert that appellant's statement of the events and evidence (App. Op. Br. pp. 37-43)¹ is inaccurate or incorrect. Appellant, therefore, comes before this Court relying not only upon the prescribed assumption that the allegations of his petition are true (*Williams v. Kaiser*, 323 U. S. 471, 89 L. Ed. 398, 65 S. Ct. 363; *White v. Ragen*, 324 U. S. 760, 89 L. Ed. 1348, 65 S. Ct. 978; *House v. Mayo*, 324 U. S. 42, 89 L. Ed. 739) but fortified by the added fact that appellee has not attempted to question the accuracy of his summation of them.

As shown by appellant's "Summary of Argument" (Op. Br. pp. 17-18) nine contentions are advanced. These fall into three general groups:

¹Hereinafter referred to as "Opening Brief."

1. (a) That appellant had exhausted his state remedies,
(b) That no further remedies in the *state* courts were available to him,
(c) That he was not required to show that his case presented exceptional circumstances of peculiar urgency.
2. That he was deprived of his constitutional guarantees under the Fourteenth Amendment in that his right of appeal was vitiated in respect to his conviction on both the grand theft counts *and* on the conspiracy count of the indictment.
3. That the record discloses a further lack of due process in respect to his conviction on the conspiracy count in that:
 - (a) The code section (Pen. Code Sec. 182) under which the charge was laid includes an unconstitutional clause,
 - (b) That the indictment alleged that one of the objects of the conspiracy charged was to do the acts purportedly inhibited by this unconstitutional clause,
 - (c) That the term of his sentence was not fixed by a judicial body,
 - (d) That he was not informed of the basis of the charge against him,
 - (e) That his right of appeal was vitiated by the manner in which his contention, that the record was devoid of proof of the existence of a conspiracy within the period of limitations, was treated by the state appellate courts.

Under Point "I" of his argument appellee has attempted to reply to Points 1(a) and 1(b) above. Under Point "II" he has sought to reply to Point 2. Under Point "III" he refers to Points 3(a) and 3(b), but does not attempt

to argue against Points 3(c) and 3(d). Under Point "IV" he purports to reply to Point 3(e) above, and under Point "V" argues, under the heading "Other Offenses," a contention which, while included in appellant's petition to the District Court below [Tr. par. XIV, p. 25], was not urged by appellant in his Opening Brief.

We feel that greater clarity of presentation will be achieved if this reply follows the order in which appellant developed his points in his Opening Brief.

ARGUMENT.

I. Appellant's Exhaustion of State Remedies.

In his Summary of Argument appellee asserts that:

"1. The fact that the Supreme Court of the State of California denied appellant's application for a writ of habeas corpus without rendering an opinion was not a good, sufficient or legal reason for the filing of a similar application with the United States District Court without first seeking a review by the Supreme Court of the United States, unless the alleged facts showed a case of peculiar urgency why the writ should issue by a federal court." (Appellee's Brief par. 1, p. 4.)

A. Contrary to this contention, the Supreme Court held in *Ex parte Hawk*, 321 U. S. 114, 117, 88 L. Ed. 572, 575:

"The statement that the writ is available in the federal courts only 'in rare cases' presenting 'exceptional circumstances of peculiar urgency,' often quoted from the opinion of this Court in United States *ex rel.* Kennedy v. Tyler, *supra* (269 U. S. 17, 70 L. ed. 143, 46 S. Ct. 1), was made in a case in which the petitioner had not exhausted his state remedies and is inapplicable to one in which the petitioner has exhausted his state remedies, and in which

he makes a substantial showing of a denial of federal right.”

In our Opening Brief we pointed out at pages 19 to 31 that appellant had exhausted his state remedies. Appellee admits at page 5, *et seq.*, of his brief that it is true that the general rule “that an application for habeas corpus by one detained under a state judgment of conviction for crime will be entertained by a federal court only after all state remedies available, including all appellate remedies in the state courts and in the Supreme Court of the United States by appeal or writ of certiorari, have been exhausted” is subject to the exception that “where the decision of the state court is that the remedy of habeas corpus is not available under the state practice, or its decision is based upon some other adequate non-federal ground * * * it is unnecessary for the petitioner to ask the Supreme Court of the United States for certiorari in order to exhaust his state remedies * * *.”

He urges, however, that where “habeas corpus is available under the state practice and the petition is based upon state and federal grounds and is denied by the state court without opinion and it appears from an examination of the record that the state grounds are insubstantial, it will be presumed that the state court based its judgment on the law raising the federal question, and the Supreme Court of the United States will take jurisdiction” (Appellee’s Brief p. 6), citing *Williams v. Kaiser, supra*, as an authority for this contention.

He then points out, as we of course concede, that the remedy of *habeas corpus* is available in the State of California and then in an effort to bring this case within the asserted rule of the *Williams* case urges “that the state grounds urged by appellant in his petition for a writ of habeas corpus filed with the Supreme Court of California are insubstantial * * *.”

In the *Williams* case the petition for writ of *habeas corpus* which Williams filed in the Supreme Court of Missouri alleged that prior to pleading guilty to, and his sentence on, an indictment charging him with robbery by means of a deadly weapon, petitioner requested the aid of counsel. At the time of his conviction and sentence the court did not appoint counsel, nor did petitioner waive his constitutional right to the aid of counsel and he was incapable adequately of making his own defense, in consequence of which he was compelled to plead guilty. He, therefore, contended that he was deprived of counsel contrary to the requirements of the due process clause of the Fourteenth Amendment.

The Supreme Court of Missouri denied the petition for the reason that it "fails to state a cause of action," but did not otherwise "indicate the reasons for its denial." Missouri did not suggest that "its habeas corpus procedure is not available in (the) situation." The Missouri Supreme Court had ruled "that when a defendant requests counsel it will be 'presumed,' in absence of evidence to the contrary, that he 'was without counsel and that he lacked funds to employ them.'"

Based upon this fact situation, the United States Supreme Court ruled that "certainly it may be reasonably inferred from that request and from the further allegation that as a result of the court's failure to appoint counsel petitioner was 'compelled to plead guilty,' that he was unable to employ counsel to present his defense because he was without funds."

The court then analyzes the application to that case of the suggestion—which we believe is most pertinent here—"that for all we (the United States Supreme Court) know the denial of the petition by the Supreme Court of Missouri rested on adequate state grounds," saying:

"It is a well established principle of this Court that before we will review a decision of a state court

it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and its decision of the federal question was necessary to its determination of the cause. (Citing cases.) And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. (Citing cases.) We adhere to those decisions. But it is likewise well settled that if the independent ground was not a substantial or sufficient one, 'it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.' (Citing cases.) Thus in *Maguire v. Tyler*, 8 Wall. (U. S.) 650, 19 L. ed. 320, and in *Neilson v. Lagow*, 12 How. (U. S.) 98, 110, 13 L. ed. 909, 914, it was contended that the judgments rested on adequate state grounds. In neither was there an opinion of the state court. The Court examined the record, found the state grounds not substantial or sufficient, and reversed the judgments on the federal question. We think the principle of those cases is applicable here. The petition establishes on its face the deprivation of a federal right. The denial of the petition on the grounds that it fails to state a cause of action strongly suggests that it was denied because there was no cause of action based on the federal right. And when we search for an independent state ground to support the denial, we find none. The Attorney General of Missouri only goes so far as to say that the petition did not state facts sufficient to justify the appointment of counsel under the Missouri statute."

"We can only assume therefore that the DENIAL by the Supreme Court of Missouri was for the reason that the petition stated no cause of action based on the federal right."¹

In the dissenting opinion filed by Mr. Justice Frankfurter and concurred in by Mr. Justice Roberts, those Justices differ with the majority only in that they state that the court should, upon the facts, have reached the opposite assumption, *i. e.*, that the court should assume "obedience" rather than "disobedience" of the mandate of the United States Constitution by the state court, and hence assume that the state court found a "local inadequacy" in the petition for *habeas corpus* and "in fact refused to grant the writ of habeas corpus because it concluded that there was not a sufficient allegation by petitioner that he had need for counsel."

In a footnote appearing on page 481 *et seq.* of the decision as reported in 323 U. S. and at p. 405 *et seq.* of the Lawyers edition, the dissenting judges summarize the law as follows:

"The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one.

¹All emphasis shown throughout this brief is that of appellant unless the contrary is noted.

But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.” (*Klinger v. Missouri*, 13 Wall. (U. S.) 257, 263, 20 L. Ed: 635, 637.)

“These settled principles were very recently again summarized in a per curiam opinion in *Southwestern Bell Teleph. Co. v. Oklahoma*, 303 U. S. 206, 212, 213, 82 L. ed. 751, 754, 755, 58 S. Ct. 528.

“We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that *it must appear affirmatively from the record*, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause; *that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it.*” (Citing cases.)

It is thus apparent that the pivot about which the case turned was the holding of the majority of the court that the “*denial by the Supreme Court of Missouri*” of the application for the writ “*was for the reason that the petition stated no cause of action based on the federal right.*”

It is not even suggested by counsel for appellee that the record at bar will support such a claim. He merely asserts that the “*state grounds urged by appellant in his petition for a writ of habeas corpus filed with the Su-*

preme Court of California are insubstantial" (Appellee's Brief p. 7), which is a wholly different thing from an assertion that the writ *was denied because "the petition stated no cause of action based on the federal right."* Indeed, the entire burden of appellee's argument extending from Point II, page 9, of his brief, to Point V, page 15, is that the grounds urged in appellant's application for the writ before the Supreme Court of California were insubstantial upon the basis of state law.

Surely, upon such a basis, there can be no room for the claim, that the denial by the Supreme Court of California was for the reason "that the petition stated no cause of action based upon federal right," or that it did "*affirmatively appear* from the record that the federal question was presented to the highest court of the State having jurisdiction and *that its decision of the federal question was necessary to its determination of the cause.*"

The case at bar is, on the contrary, one where:

"* * * in the absence of any opinion indicating that decision in the present cases turned on a Federal question, we cannot say that the refusal to entertain the petitions for habeas corpus in these cases does not rest on an adequate non-federal ground. For that reason, we must dismiss these writs of certiorari." (*White v. Ragen* and *Lutz v. Ragen*, 324 U. S. 760, 766, 67 S. Ct. 978, 89 L. Ed. 1348, 1353.)

In the case of *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 53, 79 L. Ed. 191, 192, the Supreme Court said:

"* * * The relator sought review by the Supreme Court of New York, invoking rights under the Constitution and laws of the State of New York and under the Fourteenth Amendment of the Constitution of the United States. The Appellate Divi-

sion of the Supreme Court, Third Department, annulled the determination of the State Tax Commission, 237 App. Div. 763, 263 N. Y. S. 259. That Court, while citing decisions of this Court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the United States. The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion (263 N. Y. 533, 189 N. E. 684), and the grounds of its decision are left to conjecture. *It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise."*

We have examined each of the cases cited in the *Williams* case in support of the statement that "if the independent ground was not a substantial or sufficient one, it will be presumed that the state court based its judgment on the law raising the Federal question and this court will then take jurisdiction," and find that in each of them the *ground* examined and ruled, was the *ground* upon which the state court had denied or granted the relief sought, and that in each such case the court decided from the record whether that ground rested on Federal or State laws.

It follows that it was not necessary for the appellant here to seek certiorari in the Supreme Court of the United States in order to exhaust his state remedies.

B. On page 8 of his brief appellee asserts that "Habeas Corpus Cannot Be Employed as Substitute for Writ of Error" and cites the cases following:

In the *Felts v. Murphy* case, 201 U. S. 123, 26 S. Ct. 366, 368, 50 L. Ed. 689, the court considered a contention that the fact that the defendant did not hear a word of the evidence given upon his trial because of his almost total deafness, amounted to a deprivation of his liberty without due process of law under the Fourteenth Amendment. It held that if there were any irregularities at the trial because of the failure of the court to see to it that the testimony was repeated to him through an ear trumpet, it "was at most an error which did not take away from the court its jurisdiction over the subject-matter and over the person of the accused" and that the "writ cannot perform the function of a writ of error."

In *Burall v. Johnson* (C. C. A. 9), 134 F. (2d) 614, this Court passed upon the contention that the defendant, *who had not appealed*, had been denied due process in that he was convicted on the evidence of a confession procured by duress, threats and promises and was thereby forced into becoming a witness against himself. This Court held that the time to inquire into the circumstances of the confession was during the progress of the trial, that the error, if any, was subject to correction on appeal, and that the writ of *habeas corpus* can not be used as a writ of review, or as a means of correcting error in the admission of evidence.

In *Valentina v. Mercer*, 201 U. S. 131, 26 S. Ct. 368, 370, 50 L. Ed. 693, the court considered a contention that appellant had been convicted without authority of law in that the question of her guilt or innocence of murder was not entertained by the court or submitted to the jury but on the contrary evidence was taken on the trial merely to determine the degree of her guilt.

The court held that there was "no possible doubt that the petitioner has had a *valid* trial by a court having

jurisdiction of the subject-matter and of the person of the accused and that there was no loss of jurisdiction over either at any time during the trial,” and stated:

“* * * Our power to interfere in cases of this nature is limited entirely to the question of jurisdiction. If the state court had jurisdiction to try the case, and had jurisdiction over the person of the accused, and never lost such jurisdiction, the Federal circuit court was right in denying the application of petitioner for a writ, and its order must be affirmed. A writ of this nature cannot perform the function of a writ of error.”

In *Collins v. Johnston*, 237 U. S. 502, 35 S. Ct. 649, 651, 59 L. Ed. 1071, the Court reviewed an order of a United States District Court denying a petition for writ of *habeas corpus* filed by a defendant convicted of perjury. The Court examined various of his contentions, which were representative of the rest, and rejected them as amounting to no more than error committed in the exercise of jurisdiction, unfounded as a matter of state law, or not amounting to a denial of any Federal right, and held that upon *habeas corpus* the Court was confined “to the examination of fundamental and jurisdictional questions, and that the writ cannot be employed as a substitute for a writ of error.”

In *United States v. Ragen* (C. C. A. 7), 146 F. (2d) 349, 351, the matter arose on an appeal on certificate of probable cause from a United States District Court. The reviewing court first ruled that the contention of the appellant that the judgment against him was the result of a sham trial was groundless, stating that, contrary to appellant’s contention, there was an abundance of evidence to support his conviction, and then said:

“* * * Even if we disagreed with the Supreme Court of Illinois over the sufficiency of the evidence,

we could give no relief for two reasons: First, we may not review in a habeas corpus proceeding errors of law committed by the courts of Illinois. (Citing cases.) Secondly, whether there was evidence to support the verdict involves the guilt or innocence of the appellant, with which on habeas corpus we are not concerned. As Justice Holmes said in *Moore v. Dempsey*, *supra*: “* * * what we have to deal with is not the petitioners’ innocence or guilt but solely the question whether their constitutional rights have been preserved.”

In a court of competent jurisdiction, whose jurisdiction was never lost or disturbed at any stage of the proceedings, the petitioner *received a fair and impartial trial*. That is due process. He can ask no more.”

Of, course, none of these cases reach or rule our contention which is that “The misstatement and distortion of the facts by the California District Court of Appeal vitiated, and deprived appellant of, the right of appeal guaranteed to him by the Constitution of California, and was a violation of his right to due process and the equal protection of the law under the 14th Amendment.” (Op. Br. p. 32.)

II. Appellant’s Right of Appeal.

The appellee asserts:

“The constitutional or statutory right of appeal, guaranteed by the Fourteenth Amendment of the Constitution of the United States, is not denied because an appellate court in its decision affirming the judgment ignores, distorts or misstates the evidence.” (Appellee’s Brief par. 2, p. 4.)

In his argument (Appellee’s Brief p. 9) he concedes that “the constitutional or statutory right of appeal” is

“guaranteed by the due process clause of the Fourteenth Amendment,” citing *Frank v. Mangum*, 237 U. S. 309, 35 S. Ct. 582, 587, 59 L. Ed. 969. He advances no authority, however, for his statement that this right is not denied “because an appellate court in its decision ignores, distorts or misstates the evidence.”

In the case of *Ex parte Converse*, 137 U. S. 624, 632, 11 S. Ct. 191, 193, 34 L. Ed. 796, 799, the Court ruled:

“We repeat, as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any *arbitrary* deprivation of life, liberty or property * * *.”

but held that it was not within the “province” of the Court to inquire whether the conclusion of the Supreme Court of Michigan, that a plea of guilty entered by appellant amounted to a plea of guilty to a felony rather than to a misdemeanor, “was or was not correct, for we are not passing upon its judgment as a court of error,” and that a “state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if *erroneous*, of its highest court, while acting within its jurisdiction.”

It is true, with respect to the cases cited by appellee, that *Worcester County Trust Co. v. Riley*, 302 U. S. 292, 58 S. Ct. 185, 188, 82 L. Ed. 268, holds that the Constitution of the United States does not guarantee that the decision of the state courts shall be free from error; that the case of *Central Land Co., etc. v. Laidley*, 159 U. S. 103, 112, 16 S. Ct. 80, 83, 40 L. Ed. 91, 95, holds that “*When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party * * * of due process*”; that *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97, 29 S. Ct. 220, 221, 53 L. Ed. 417, 425, holds that the Federal courts do not sit to review the findings of fact made in the state

court "but accepts (them) as conclusive" and confine their review to "questions of Federal law within the jurisdiction conferred upon this court", and that *Milk Drivers, etc. v. Meadowmoore Dairies*, 312 U. S. 287, 294, 61 S. Ct. 552, 85 L. Ed. 836, 841, states that the "place to resolve conflicts in the testimony and its interpretation was in the Illinois courts and not here."

These cases, however, do not reach or rule the contention of appellant. He asserts not mere error, such as was considered in the above cases, but rather such action by the California courts as "in effect deprived (him) of his right of appeal" (Op. Br. pp. 33-37), or expressed in terms of error, "error * * * gross and obvious, coming close to the boundary of arbitrary action." *Roberts v. City of New York*, 295 U. S. 264, 277, 79 L. Ed. 1429, 1435.

In our view, appellee overlooks the fact that in *Frank v. Mangum, supra*, the Supreme Court of the United States in holding at p. 327, L. Ed. p. 980:

"* * * And while the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases (citing cases), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the 14th Amendment."

commented on the fact that Congress in the Act of Feb. 5, 1867 (14 Stat. at L. 385) liberalized the prior law, saying at p. 330, L. Ed. p. 981:

"* * * The effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common-law practice, and under the act of 31 Car. II, chap. 2, a more searching investigation, in which the applicant is put upon his oath to set forth the truth of the matter respecting the

causes of his detention, and the court, upon determining the actual facts, is to 'dispose of the party as law and justice require.'

There being no doubt of the authority of the Congress to thus liberalize the common-law procedure on habeas corpus in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution or a law or treaty established thereunder, it results that under the sections cited a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very *truth and substance* of the causes of his detention, although it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the state court to proceed to judgment against him. (Citing cases.)",

and further said:

"In the light, then, of these established rules and principles: that the due process of law guaranteed by the 14th Amendment has regard to *substance of right, and not to matters of form or procedure*; that it is open to the courts of the United States, upon an application for a writ of habeas corpus, *to look beyond forms and inquire into the very substance of the matter*, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, * * *",

and that Mr. Justice Holmes, in his dissenting opinion, with whom Mr. Justice Hughes concurred, used these words at p. 346, L. Ed. 988:

"* * * But habeas corpus cuts through all forms and goes to the very tissues of the structure. It comes in from the outside, not in subordination to the proceedings, and *although every form may have been preserved, opens the inquiry whether they have been more than an empty shell*",

Appellee also overlooks the fact that the Supreme Court in the late case of *Carter v. Illinois Supreme Court*, L. Ed. Adv. Ops. Vol. 91, No. 3, pp. 157, 159, said:

“In a series of cases of which *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543, 43 S. Ct. 265, was the first, and *Ashcraft v. Tennessee*, 327 U. S. 274, 90 L. Ed. 667, 66 S. Ct. 544, the latest, we have sustained an appeal to the Due Process Clause of the Fourteenth Amendment for a fair ascertainment of guilt or innocence.”

* * * * *

“The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry *into the intrinsic fairness of a criminal process even though it appears proper on the surface*. *Mooney v. Holohan*, 294 U. S. 103, 79 L. Ed. 791, 55 S. Ct. 340, 98 A. L. R. 406. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers’ language, *dehors the record*.”

* * * * *

“* * * A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of habeas corpus or *coram nobis*. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or, it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention (citing cases). So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated.”

We submit that whatever the mode provided by the State—in this case the writ of *habeas corpus*—the petitioner is entitled to relief if he is shown to have been denied the substantial exercise of such constitutional right as distinguished from the merely colorable exercise of it.

III. Appellant's Contentions Respecting the Unconstitutionality, in Part of Penal Code Section 182 and the Resultant Denial of Due Process.

Appellant advanced in his Opening Brief, among others, three grounds in respect to his conviction of conspiracy, numbered as follows:

Point 3: That the clause in Section 182 reading "To cheat and defraud any person of any property by any means which are in themselves criminal" was unconstitutional and void for vagueness and uncertainty;

Point 4: That appellant's conviction of a conspiracy which included as one of the objects the commission of the purported offense above quoted was in violation of the due process clause of the Fourteenth Amendment;

Point 5: That because different penalties were prescribed, depending on the objects of the conspiracy, the imposition of a sentence "for the term prescribed by law" constituted a denial of due process.

Appellee, significantly, does not question the soundness or applicability of the authorities cited by appellant in support of these points. He merely refers to the circumstance that appellant's petition for a writ of *habeas corpus* to the California Supreme Court set forth these grounds and that the opinion of the District Court of Appeal which affirmed the conviction does not disclose that a contention was made as to the unconstitutionality of Section 182.

Appellee argues that "Since the validity of Section 182 of the Penal Code was presented to the Supreme Court of the State of California by *habeas corpus*, it was unneces-

sary for the Supreme Court in such proceeding to consider whether said clause in said code section was unconstitutional because of uncertainty or vagueness, or otherwise." (Appellee's Brief p. 13.) In support of this statement he cites the case of *In re Bell*, 19 Cal. (2d) 488, 122 Pac. (2d) 22.

In the *Bell* case the court did consider the validity of the ordinance in question and held at page 497:

"* * * The entire section is therefore invalid even though Yuba County might validly prohibit excessive and unnecessary obstruction of the streets and highways."

At page 495 of the opinion it is said:

"While a few courts require that all available remedies by appeal be exhausted before *habeas corpus* can be invoked to test constitutionality (see *Goto v. Lane*, 265 U. S. 393 (44 S. Ct. 525, 68 L. ed. 1070)), most jurisdictions, including California, do not make the requirement mandatory (see cases collected in 13 Cal. Jur. 225, sec. 8; 25 Am. Jur. 164, sec. 29), and even permit the issue of constitutionality to be raised by *habeas corpus* before trial." (Citing cases.)

However, assuming for the sake of the argument that the above mentioned points of appellant were rejected by the California Supreme Court in its consideration of appellant's application for *habeas corpus*, for the reason advanced by appellee, his argument in the last analysis is that an adequate non-federal ground existed for said denial.

IV. The Failure of Appellee to Respond to Point 6 of Appellant's Brief.

It will be noted that appellee has failed to respond to the contentions advanced by appellant under Point 6 of his Opening Brief.

These contentions relate to the proposition that appellant was denied due process of law and the equal protection of the law in that he was not informed of the basis of the

charge of conspiracy nor given the opportunity to prepare his defense thereto.

A further contention under this heading is to the effect that section 952 of the Penal Code of California is unconstitutional in so far as the provisions of that section were relied upon to authorize the pleading of a conspiracy in the manner in which it was pleaded in the instant case.

We, therefore, respectfully invite the court's attention to page 62, *et seq.*, of Appellant's Opening Brief.

V. Appellant's Contention That His Right of Appeal Was Vitiating by the Manner in Which the District Court of Appeal Disposed of the Claim That There Was No Proof of the Existence of a Conspiracy Within the Statutory Period of Limitations.

Appellee responds to this contention of appellant (Opening Brief, pp. 68-69), saying:

"From the narration of the evidence set forth in the opinion of the said District Court of Appeal, it is reasonable to conclude that the court found that the conspiracy existed within three years of the return of the indictment." (Appellee's Brief p. 14.)

It is precisely for the reason that the "narration of the evidence set forth in the opinion of the said District Court of Appeal" is not a true narration that complaint is made of the vitiating of appellant's right of appeal. The crux of this contention is the vitiating of appellant's right of appeal and not, as appellee seems to believe, a mere question of the insufficiency of proof of the existence of the asserted conspiracy during the three-year period.

Conclusion.

Appellant therefore respectfully submits that the District Court below erred in discharging the order to show cause and in denying the issuance of a writ of *habeas corpus*, and that he is entitled to the relief which he seeks.

Respectfully submitted,

MAURICE GORDON,

Attorney for Appellant.

No. 11564

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DAVID E. MEINTSMA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE UNITED
STATES OF AMERICA.

JAMES M. CARTER,

United States Attorney,

RONALD WALKER and

ROBERT E. WRIGHT,

Assistant United States Attorneys,

Proctors for Appellee.

LASHER B. GALLAGHER,

458 South Spring Street,
Los Angeles 13, California.

Of Counsel.

FILED

MAY 17 1947

PAUL P. O'BRIEN,
CLERK

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No. 11564

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DAVID E. MEINTSMA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE UNITED
STATES OF AMERICA.

Statement of the Case.

Appellant makes no reference to the pleadings raising the issues upon which the case went to trial. It will simplify the labor of this Honorable Court to have certain propositions pointed out clearly at the outset. The libel contains one cause of action. That cause of action is for damages for personal injuries. There is no cause of action for the recovery of maintenance. There is no cause of action for the recovery of wages. As a matter of fact there are no allegations in the libel with reference to any claim for maintenance or wages.

In appellant's Statement of the Case, he says that he was required to walk "on the *slippery* steel noses of the steps instead of on the flat treads." (Op. Br. p. 3, lines 16-17.) There is no evidence that the steel noses of the

steps were slippery or that the steel nose of any step was slippery.

Appellant also omits to include in his Statement of the Case certain testimony given by him which appellee believes is important. It is as follows:

Whatever movement was occurring in the way of the ship getting away from the dock and moving back toward the dock was a slow movement and didn't occur very often. [Ap. 24.]

When I got to the bottom step (of the gangway) I hesitated for a few seconds or a minute before I made up my mind to jump. I was thinking over in my own mind whether I could or could not make it. After looking the whole situation over and considering my own physical ability and condition I came to the conclusion that I could jump and make this space and land safely. After I went through those mental calculations and thoughts I jumped. [Ap. 34-35.]

The gangway was one that stayed close to the side of the ship all the way down to the bottom. At the end of the gangway there were two ropes, one on each side, which went from the extreme lower end of the gangway up onto some part of the ship. There was one rope on the outside and one on the inside of the lower end of the gangway. There was no reason why I could not hold onto that rope or one of them when I got to the bottom of the gangway. I may have grabbed hold of one of those ropes to help me swing ashore.

After I got down there to the bottom of the gangway and surveyed the situation I did not think about going back aboard ship at all for any purpose. All of the officers were aboard ship that day before I left.

I don't know who would be responsible for rigging the gangway. From my experience aboard ship I knew that any one of the mates would have authority to do something about it if he was asked. I knew that at least some of the deck officers were aboard the ship. The reason I didn't go back upstairs and ask one of them to have the end of the gangway lowered down so that it would come nearer to the dock before I tried to get off was I just didn't think of it. That occurred to me as rather a sensible thing to do under the circumstances but I wasn't actually aware of the circumstances until I reached the end of the gangway. I have told you that when I got to the top of the gangway, before I started down, I could see it wasn't touching the dock; I knew that.

I knew at the time I started down the gangway that the lower end of the gangway wasn't resting on the dock. I could see there was a space between the lower end of the gangway and the nearest surface of the dock before I started down. My judgment of distance was good enough to let me know that it was at least two or three feet between the lower end of the gangway and the dock before I started down. From the top of the gangway to the bottom of the gangway was about 15 feet. It was broad daylight.

If there hadn't been any gangway there at all I wouldn't have jumped from the deck of the vessel out to the dock. [Ap. 36-39.]

The reason I didn't go and ask somebody to lower the gangway so that it would come in contact with the dock or be close enough so that there wouldn't be any step to speak of was that I was just under the impression that I would be able to make it. That is all I can say. In other

words, my explanation is this: When I was up there at the top of the gangway and could see the situation fairly accurately I came to the conclusion that I could make it and there was no necessity to ask anybody to lower it. [Ap. 40.]

When I went down the gangway the last time it had been re-rigged so that the lowest end was closer to the dock. I believe it was setting on the dock. I didn't have to jump at all. I had no trouble getting off the gangway the last time. [Ap. 45.] I wouldn't have had any trouble just jumping from the lower end of the gangway onto the dock if the lower end of the gangway had been directly above the surface of the dock. The thing that really caused the trouble was not the distance between the lower end of the gangway and the surface of the dock but the fact that the ship had moved two or three feet away from the dock; being away from the dock was really the source of the trouble. [Ap. 46.]

Statement as to Jurisdiction.

In view of the contentions asserted by the appellant (for the first time on appeal) that he is entitled to maintenance and wages, appellee disputes appellant's contention that this Honorable Court has jurisdiction over those subject matters. Appellant's right to sue the United States of America is found in Title 50 App. U. S. C. A., Sec. 1291. In substance, as applied to the facts of this case, the section provides that the members of a crew on a United States vessel as employees of the United States through the War Shipping Administration shall, with respect to injuries, maintenance and cure, and the collection of wages, have all of the rights under law applicable to citizens of the United States employed as seamen on

privately owned and operated American vessels, but that before any suit shall be commenced a claim must be presented for administrative consideration. The Court has no jurisdiction to consider any claim for maintenance or wages in the case at bar for the reason that there is no showing that any such claims were ever submitted for administrative handling.

This Honorable Court will notice that the libel is silent with reference to maintenance and wages.

Appellee's Argument.

In order to recover or make out a *prima facie* case the appellant would be required to prove that there was some defect or insufficiency in connection with the gangway and that such defect or insufficiency was due to negligence on the part of appellee or that some fellow crew member was negligent and that such negligence wholly or in part caused appellant some injury.

The appellant has offered no evidence showing that the gangway was in a defective condition or that it was insufficient for the purpose for which it was furnished. Appellant has offered no evidence showing that any fellow crew member was guilty of any negligence in the premises.

Appellant's testimony shows that the gangway could have been lowered so that the lower portion with the wheels would have rested on the surface of the dock. Appellant would have the Court treat him as though he were *no sui juris*. If there had been no gangway at all and the appellant had a desire to get from the vessel to the dock the Court would certainly make it his obligation to request that the vessel furnish some means of getting from

the vessel to the dock and wouldn't permit appellant to recover in the event he chose to jump.

Appellee contends that the seaman himself is under an obligation to ask for those things which he may need in the event they are not present at the exact time when he desires to use them. If the appellant in the case at bar had requested that the gangway be lowered so that it would be in contact with the surface of the dock before he started down there is no reason to assume that his request would not have been complied with.

The testimony of the appellant shows that he voluntarily came to the conclusion, after surveying the situation, that he could accomplish the jump. Having made up his own mind and not being under any orders to leave the vessel at the particular moment, it seems to appellee that there is no ground upon which appellant can now claim damages for the injuries sustained.

Respectfully submitted,

JAMES M. CARTER,

United States Attorney,

RONALD WALKER and

ROBERT E. WRIGHT,

Assistant United States Attorneys,

ROBERT E. WRIGHT,

Proctors for Appellee.

LASHER B. GALLAGHER,

Of Counsel.

No. 11567

United States
Circuit Court of Appeals
For the Ninth Circuit.

SHEVLIN-HIXON COMPANY, a corporation,
Appellant.
vs.

GALINA M. SMITH,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Oregon

FILED

JUN 27 1947

PAUL P. O'BRIEN,

CLERK

No. 11567

United States
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SHEVLIN-HIXON COMPANY, a corporation,
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For Appellant.

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Portland, Oregon,
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In the District Court of the United States
For the District of Oregon

Civil Action No. 2391

GALINA M. SMITH,

Plaintiff,

vs.

SHEVLIN-HIXSON COMPANY, a Corporation,
Defendant.

PRETRIAL PROCEEDINGS

This cause came on regularly for pretrial before the Honorable James Alger Fee, District Judge, on the 22nd day of May, 1944, Plaintiff was represented by Harry George and Emerson Sims, her attorneys, and Defendant was represented by J. C. Veazie, its attorney.

Based on the proceedings had at said pretrial hearing,

It Is Ordered that the following matters are admitted as to the issues framed by the complaint herein and the answer to the complaint.

I.

This is an action brought under and by virtue of the Employers' Liability Act of the State of Oregon (Sec. 102-1601 O.C.L.A. 1940), which requires, among other things, "all owners, contractors or sub-contractors or other persons having charge of, or responsible for, any work involving

risk or danger to employees or the public, to use every device, care and precaution which is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices." [7*]

II.

The parties have entered into the following stipulation of facts which have been agreed to be the facts on which this action is based:

1. That the defendant, Shevlin-Hixson Company, is a Delaware corporation and, therefore, a citizen of that state. The plaintiff is a citizen of Oregon, and the amount in controversy, exclusive of interest and costs, exceeds \$3,000.

2. That defendant operates, among other things, a box factory where many power-driven machines are employed, at Bend, Oregon, where it employed the plaintiff between the dates of October 26, 1942, to August 24, 1943. That said box factory is an integral part of a large lumber manufacturing plant in which much power-driven machinery is used.

3. That on May 15, 1943, and for some time prior thereto, plaintiff had been directed and assigned to do "punking" work—that is, grading, sorting and stacking, behind a hi-cut-off saw.

* Page numbering appearing at foot of page of original certified Transcript of Record.

4. That plaintiff's place of employment was a space approximately 3 feet square surrounded on three sides by tables, the tops of which were approximately 33 inches from the floor, the exact height being in disagreement and set out more particularly in paragraph 2, page 3 herein, the fourth side being rolls approximately the same height from the floor. That in said room and said box factory were eight hi-cut-off saws, a number of ripaws and resaws, all being power-driven machinery and, in addition thereto, moving rolls. That plaintiff was required to and did work within arm's length of the rolls and hi-cut-off saws and was required to pass by and work near the other operating power-driven machinery daily during the course of her employment.

5. That the hi-cut-off saw was located approximately 2 feet above the tables surrounding plaintiff on the end [8] and opposite the rolls. Here the sawyer took lumber from a bin or stall behind him and sawed it into short lengths, which he slid down to the table where plaintiff was working. Plaintiff then sorted the cut lumber and, after stacking it, placed it on the rolls which carried it away.

6. That the company operated eight or more such cut-off saws located one to each stall, side by side.

7. That an overhead cat-walk with descending stairs allowed the sawyers to get to their machines.

8. That as soon as the sawyer finished all of the lumber in one bin, he, together with his "punk" or "grader," moved to the next machine.

9. That there were four sawyers working at the same time the night of the accident.

10. That the company operates a day shift and a night shift; the night shift starting at 5:00 p.m. and ending at 1:30 a.m. That plaintiff was employed on the night shift.

11. That the night foreman was Guy Smith.

12. That the sawyer with whom plaintiff worked was Edward Leacock.

13. That on May 15, 1943, plaintiff was taken at the direction of Guy Smith, foreman, by Norval Hufstader in his automobile to the Lumbermens Hospital, with an injured knee.

It Is Further Ordered that the contested issues to be submitted to the Court for determination in connection with the issues framed by this pretrial are as follows:

1. That plaintiff contends that the rolls were live rolls. Defendant denies this and contends that they were operated solely by gravity.

2. Plaintiff contends that tables she had to go over were 36 inches from the floor. Defendant denies this and contends that tables were only 33 inches from the floor.

3. Plaintiff contends that prior to May 15, 1943, [9] she lost no work because of any complaint connected with her knee and had not lost more than two days since she started working for the company. Defendant denies this.

4. Plaintiff contends she was working behind No. 3 cut-off saw, and, finishing, moved to No. 4

cut-off saw, where she was injured. Defendant contends she was working in No. 5 at the time she contends she was injured.

5. Plaintiff contends that the only means of entrance into her place of employment was to come down the cat-walk, crawl over a rail to the table, and then jump from it to the floor or crawl over the rolls. Defendant contends she could have walked into her place of employment on the floor level or entered either under or over the rolls or could have descended safely without jumping.

6. Plaintiff contends that a ladder, stairway, or a redesigning of the operational set-up could have been used without impairing the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices, which would have permitted a safe means of entering her place of employment and not required her to jump down 33 to 36 inches to said place of employment. Defendant denies this and contends there was a safe means of entry that she could have used. Defendant admits, however, that on or about April 17, 1944, the rolls were removed from the rear of the inclosure plaintiff had been required to work in, and a moving belt placed under the front table, which left the rear of said inclosure open.

7. Plaintiff contends that on May 15, 1943, when she jumped from the table top to the floor to begin work, she suffered a fractured bone and semilunar cartilage and other damage thereto, the exact nature and extent of which is unknown to the plaintiff, of

her right knee, together with torn and wrenched ligaments of said knee. Defendant denies that she jumped, as alleged, and contends that she was not injured at all on May 15, 1943, that she had no fractured semilunar cartilage or wrenched knee, or other injury thereto which [10] was sustained by plaintiff in its said box factory, and that, if she did jump, it was her own negligence.

8. Plaintiff contends she was damaged in the sum of \$7,400. Defendant denies this.

9. Plaintiff contends that because she was employed in a box factory or sawmill, that because she was required to and did work close enough to touch the moving rolls and dangerous hit-cut-off saw blades, and that by reason of being, during the course of her daily employment, required to be near and about the various other power-driven rip-saws and resaws, that by reason of the means of ingress and egress to her place of employment, that because during her working hours she was subjected to the dangers and hazards thereof, and that because of the nature of such employment generally, that her said work which she was required to perform was one involving risk and danger to the employees and to the public, and particularly to herself, within the meaning of the Employers' Liability Act of the State of Oregon. This contention of the plaintiff's is denied by the defendant and defendant denies that any risk or danger referred to in or within the interpretation of the Employers' Liability Law of the State of Oregon caused or in any

way contributed to the injury plaintiff claims to have suffered, or any injury to her.

EXHIBITS

At the pretrial the following exhibits were introduced, subject to objection by either party, it being understood that these are in addition to the exhibits submitted at the time of taking the depositions and now in custody of the court:

Plaintiff's Exhibit No. 12—Statement of income.

Plaintiff's Exhibit No. 13—Depositions taken at Bend, Oregon.

Plaintiff's Exhibit No. 14—Memo of final wage payment.

Plaintiff's Exhibit No. 15—Picture of plant.

Plaintiff's Exhibit No. 16—Statement of Fern E. Boughton.

Plaintiff's Exhibit No. 17—Statement of Hope H. Clark.

Plaintiff's Exhibit No. 18—Statement of W. T. Curtis.

Plaintiff's Exhibit No. 19—Statement of Frances Hastings.

Plaintiff's Exhibit No. 20—Statement of Shirley Hastings.

Plaintiff's Exhibit No. 21—Statement of Clara R. Long.

Plaintiff's Exhibit No. 22—Statement of Anna Belle McGrady.

Plaintiff's Exhibit No. 23—Statement of Beth R. Norton.

Plaintiff's Exhibit No. 24—Statement of Mae Arthur Welch. [11]

Defendant's Exhibit No. 25—Engineer's drawing.

Defendant's Exhibit No. 26—Pictures.

Defendant's Exhibit No. 27—Pictures.

Defendant's Exhibit No. 28—Pictures.

Defendant's Exhibit No. 29—Pictures.

Defendant's Exhibit No. 30—Time sheet.

Defendant's Exhibit No. 31—X-ray picture.

Defendant's Exhibit No. 32—X-ray picture.

Plaintiff's Exhibit No. 33—X-ray picture.

Plaintiff's Exhibit No. 34—X-ray picture.

Based upon the hearing before this Court, and the Court being advised in the premises,

It Is Ordered that the foregoing constitutes the pretrial order in the above-entitled action and that the foregoing order supercedes the pleadings, and said pretrial order shall not be amended in the trial except by consent or by order of the Court to prevent manifest injustice.

Dated this 1st day of November, 1944.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Nov. 1, 1944. [12]

In the District Court of the United States
For the District of Oregon

Civil No. 2391

GALINA M. SMITH,

Plaintiff,

vs.

SHEVLIN-HIXSON COMPANY, a Corporation,
Defendant.

VERDICT

We, the jury, duly impaneled and sworn to try the issues of fact in the above-entitled cause in the above court, find our verdict in favor of the plaintiff, Galina Smith, and against the defendant Shevlin-Hixon Company, a corporation, and assess plaintiff Galina Smith's damages in the sum of \$5900.00.

Dated at Portland, Oregon, this 5th day of December, 1946.

/s/ BARNEY CABLE,
Foreman.

[Endorsed]: Filed Dec. 5, 1946. [13]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND IN THE ALTERNATIVE AS A MOTION FOR A NEW TRIAL

Comes now the defendant and moves the Court for judgment in its favor, notwithstanding the verdict returned by the jury, on the grounds and for the following reasons:

1. That there is no competent evidence on which a jury could find a verdict in favor of plaintiff;

2. That it appears as a matter of law, that there was no violation of the Employers' Liability Act, which was the proximate cause of plaintiffs' alleged injury;

3. That it appears affirmatively from the evidence that plaintiff was not injured by reason of any machinery, electricity or absence of any safeguards to the same, but was injured, if at all, by reason of jumping from a sitting position from a table 33 inches in height, and there is nothing inherently dangerous in such a table, or in jumping from a sitting position from such table, but on the contrary a table of such dimension is something common to all and is in ordinary general use, and jumping from a sitting position from similar tables is done thousands of times daily in homes, offices and factories, and such a movement in descending from a table of this ordinary height offers nothing as a matter of law which could be said to be inherently dangerous;

4. That there was a complete failure of proof

by the plaintiff that she was required to jump while in a [14] standing position from the top of the table to the floor, the only evidence being that she was in a sitting position on the table and then jumped to the floor;

5. That there is no competent medical evidence that the plaintiff received the injury to her knee as alleged in her complaint and as contended by her in the pretrial order, but on the contrary the medical evidence is based upon hypothetical questions which were absent from the case and which were never developed by way of evidence in the case, and there is a complete hiatus between the hypothetical questions and the evidence produced;

6. That there is no competent medical evidence in this case sufficient to support a verdict by the jury in favor of the plaintiff, as the medical testimony is hypothetical and is based upon the possibility of an injury occurring, rather than the legal test of probability that an injury occurred, and, as shown by plaintiff's medical expert, he had no history, knowledge or information as to the distance plaintiff was supposed to have jumped, and no competent medical testimony was produced by plaintiff that a mere jump from a sitting position off the table would have probably produced the injury of which she complains.

7. It appears from the evidence that plaintiff's knee condition could be the result of one of two or more causes, and the jury in its verdict was required to speculate and conjecture as to which of

two or more causes brought about plaintiff's condition.

8. That the jury's verdict is against the law and the evidence.

VEAZIE, POWERS & VEAZIE,
Attorneys for Defendant. [15]

I hereby certify that the foregoing Motion for Judgment Notwithstanding Verdict in my opinion, is well founded in law.

/s/ JAMES ARTHUR POWERS,
Of Attorneys for Defendant.

Due service of the foregoing Motion by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on the 12th day of December, 1946, hereby is accepted.

/s/ JOHN F. CONWAY,
Of Attorneys for Plaintiff.

[Endorsed]: Filed Dec. 12, 1946. [16]

In the District Court of the United States
For the District of Oregon

Civil No. 2391

GALINA M. SMITH,

Plaintiff,

vs.

SHEVLIN-HIXON COMPANY, a Corporation,
Defendant.

JUDGMENT

This cause having come on for trial on December 3, 4 and 5, 1946, before the Hon. Claude McColloch, a Judge in the above-entitled court, in the above-entitled cause, plaintiff appearing in person and by E. U. Sims, John F. Conway and Harry H. George, Jr., her attorneys, and the defendant appearing by James Arthur Powers, of the firm of Veazie, Powers and Veazie, its attorneys, whereupon a jury was duly and regularly impaneled and sworn to try said cause, and after hearing the testimony and evidence of plaintiff and her witnesses and testimony and evidence of the defendant's witnesses, in said cause, and after both parties had rested, said cause was thereupon submitted to a jury after arguments of respective counsel and instructions by the Court and the jury retired to consider its verdict and thereupon and on the 5th day of December, 1946, the jury returned a verdict into Court, which verdict, omitting the title of the cause, was in words and figures substantially as follows:

“We, the jury, duly impaneled and sworn to try the issues of fact in the above-entitled cause in the above court, find our verdict in favor of the plaintiff, Galina Smith, and against the defendant, Shevlin-Hixon Company, a corporation, and assess plaintiff Galina Smith’s damages in the sum of \$5,900.00.

“Dated at Portland, Oregon, this 5th day of Dec., 1946.

BARNEY CABLE,
Foreman.” [17]

And said verdict having been duly and regularly received and entered of record and this cause now coming on for judgment based upon said verdict;

It Is Now Hereby Ordered and Adjudged that the said plaintiff, Galina M. Smith, shall have and recover a judgment against the said defendant, Shevlin-Hixon Company, a corporation, for the sum of \$5,900.00 and for plaintiff’s costs and disbursements herein, taxed and allowed at \$541.62.

And after argument of respective counsel, and the Court being now fully advised, It Is Further Ordered that the motion of said defendant for a directed verdict in its favor against plaintiff, made at the last trial of this cause on December 4, 1946, be and it hereby is denied and overruled in all respects;

And, after argument of respective counsel, and the Court being now fully advised, It Is Further Ordered that the motion of said defendant for a Judgment Notwithstanding the Verdict and in the

alternative as a motion for a New Trial made on December 12, 1946, be and it hereby is denied and overruled in all respects.

Done in open court this 24th day of December, 1946.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed Dec. 24, 1946. [17-a]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Galina M. Smith, the above-named plaintiff;
and

To: John F. Conway, Harry H. George, Jr., and
Emerson U. Sims, her attorneys:

Notice Is Hereby Given that the Shevlin-Hixon Company, a corporation, the above-named defendant, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, and the whole thereof, entered in this action on the 24th day of December, 1946, and which judgment is now final.

VEAZIE, POWERS & VEAZIE,

By JAMES ARTHUR POWERS,

Of Attorneys for Appellant,
the Shevlin-Hixon Com-
pany, 611 Corbett Building,
Portland 4, Oregon.

Service of the foregoing, by receipt of a duly certified copy thereof, in Multnomah County, Oregon, on this 27th day of January, 1947, is hereby admitted.

/s/ JOHN F. CONWAY,

Of Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 27, 1947. [18]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The above-named defendant-appellant, upon its appeal herein, will rely upon the following points, to-wit:

1. That there is no competent evidence to support a verdict in favor of plaintiff;
2. That as a matter of law, there was no violation of the Employers Liability Act; that the matter complained of was not the proximate cause of plaintiff's alleged injury;
3. The trial court erred in failing to instruct the jury properly as to the law in regard to the Employers Liability Act with reference to the facts which the jury must find in order for said act to be applicable;
4. The trial court erred in refusing to hold as a matter of law that the activity in which plaintiff was engaged at the time of her alleged injury, in getting down from a sitting position from a 33-inch table, was not inherently dangerous;
5. The trial court erred as a matter of law in

failing to instruct the jury properly as to the measure of damages in this case;

6. The trial court erred as a matter of law in refusing to instruct the jury, as requested by defendant, that plaintiff could not recover for any injury or disability caused by traumatic arthritis, no claim having been made for traumatic arthritis;

7. That there is no competent medical evidence sufficient to support the jury's verdict in favor of plaintiff, in that the only medical testimony as to the cause of the injury is based upon hypothetical situations, not connected with the facts shown by the evidence; it appears from the testimony of plaintiff's medical expert that he had no history, knowledge or information as to manner, distance or height plaintiff jumped, or whether she jumped from a sitting position;

8. There is no competent medical evidence in this case sufficient to support the jury's verdict, in that plaintiff's medical testimony showed only possibility rather than probability of injury. The jury was required to speculate and conjecture as to which of two or more causes was responsible for plaintiff's alleged injury.

Dated at Portland, Oregon, this 4th day of March, 1947.

/s/ ALFRED C. VEAZIE,

Of Attorneys for Defendant-
Appellant.

State of Oregon,

County of Multnomah—ss.

Service of the within Statement of Points on

Appeal is hereby accepted in Portland, Multnomah County, Oregon, this 4th day of March, 1947, by receiving a copy thereof, duly certified to as such by Alfred C. Veazie, of Attorneys for Defendant-Appellant.

/s/ JOHN F. CONWAY,
Of Attorneys for Plaintiff-
Appellee.

[Endorsed]: Filed March 4, 1947. [22]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 29, inclusive, constitute the transcript of record upon the appeal from a judgment of said Court in a cause therein numbered Civil 2391, in which Shevlin-Hixon Company, a corporation, is defendant and appellant and Galina M. Smith is plaintiff and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said Court in said cause, in accordance with the said designation, as the same appears of

record and on file at my office and in my custody.

I further certify that I have enclosed a duplicate transcript of trial proceedings dated December 3, 4 and 5, 1946, and original exhibits 1 to 36, inclusive.

I further certify that the cost of comparing and certifying the within transcript is \$51.25 and that the same has been paid by appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 17th day of March, 1947.

[Seal] LOWELL MUNDORFF,
Clerk.

/s/ By F. L. BUCK,
Chief Deputy. [29]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Portland, Oregon, December 3, 1946, a.m.

Before: Honorable Claude McColloch,
Judge.

Appearances: Messrs. Emerson Urquhart Sims
and John F. Conway, Attorneys for Plaintiff.

Mr. James Arthur Powers (Veazie, Powers &
Veazie), of attorneys for Defendant.

Court Reporter: Ira G. Holcomb.

(A jury was selected to try the case. Thereupon, counsel for the plaintiff and defendant outlined the case to the jury.)

Mr. Sims: We would like to read certain depositions, in conformity with our stipulation.

Mr. Powers: I will be glad to help you.

Mr. Sims: Do you want to read the questions and I will read the answers?

Mr. Powers: It does not make any difference.

DEPOSITION OF J. D. DONOVAN, A
WITNESS ON BEHALF OF PLAINTIFF

(The deposition of J. D. Donovan was then read as follows:

“Q. What is your name and initials, Mr. Donovan? A. J. D. Donovan.

“Q. Mr. Donovan, just briefly, tell us what your duties are and what your work here in——

“A. I am a member of the Lumbermen’s Hospital Association down here. It is my business to operate a hospital to take care of the sickness and accidents that happen at other plants, Brooks-Scanlon and Shevlin-Hixon.

“Q. Was that your occupation and duty or employment for the last year?

“A. It has been for the last twenty-five or thirty years.

“Q. Right here in Bend, Deschutes County?

“A. Yes.

“Q. Do you have some records referring to Galina M. Smith? A. I do, sir. [2*]

“Q. May we have them, please?

“A. Yes, sir.

* Page numbering appearing at top of page of original Reporter’s Transcript of Record.

(Deposition of J. D. Donovan.)

“(Witness produced some X-rays and documents.)”

Mr. Powers: I will stipulate that the X-rays received in evidence at the last trial may go in without identification, your Honor.

Mr. Conway: The X-rays 1 and 2, are referred to here. What was the next item? Exhibit No. 3 is the hospital record, chart account and register.

Mr. Powers: That is right, No. 3.

Mr. Conway: Exhibit No. 4 is a hospital slip No. 601.

Mr. Powers: That is right, No. 4.

Mr. Conway: Exhibit No. 5 is a hospital report.

Mr. Powers: Hospital slip, that is right.

Mr. Conway: Exhibit No. 6 is a doctor's slip or report.

Mr. Powers: That is right.

Mr. Conway: Exhibit No. 7 is a hospital report, No. 713.

Mr. Powers: That is right.

Mr. Conway: Exhibit No. 8 is another hospital slip or report.

Mr. Powers: That is right.

Mr. Conway: Exhibit No. 9 is a hospital report.

Mr. Powers: That is correct.

Mr. Conway: Exhibit No. 10——

Mr. Powers: Well, that is another hospital report. [3]

Mr. Conway: Referring to Plaintiff's Exhibit No. 1——

(Deposition of J. D. Donovan.)

Mr. Powers: Excuse me just a minute. There is another one here, Exhibit No. 11.

Mr. Conway: Well, I don't find it here. Was that received in evidence?

Mr. Powers: Excuse me. That was a part of another matter. That is all, I guess. Go ahead.

(Reading of deposition of J. D. Donovan continued:)

“Q. Referring to Plaintiff's Exhibit 1 for identification, I will ask you if you know what this is, Mr. Donovan.

“A. Yes. This is an X-ray picture of Galina M. Smith's knee.

“Q. That is the right knee?

“A. I don't know. I couldn't tell you whether it is or not.

“Q. Likewise, I am handing you Plaintiff's Exhibit 2 for identification, and ask you if you know what that is.

“A. That is another view of Galina Smith's knee.

“Q. Handing you Plaintiff's Exhibit 3 for identification, I will ask you what that is.

“A. That is the monthly record kept in the hospital, of doctors' charges and diagnosis.

“Q. What does that show?

“A. That shows that the lady was treated in May for arthritis, and in June, bursitis, and in July for fracture of the semi-lunar cartilage and bursitis of

(Deposition of J. D. Donovan.)

the knee. She was treated for floating semilunar cartilage. [4]

"Q. What does 'A' indicate?

"A. Accident.

"Q. What does 'W' indicate?

"A. Under 'Doctor,' that indicates the initials of the doctor, Doctor Woerner.

"Q. The second page indicates what?

"A. The second page indicates that Dr. Woerner took care of Mrs. Smith in November, '42—'43 is this one, '42 is that one.

"Mr. Veazie: The one with November is '42, the other is '43.

"Mr. Sims: I wonder if you would have any objection to our withdrawing the part of the exhibit which refers to '42? It simply indicates she had a cold and went to the doctor.

"Mr. Veazie: I don't believe that is of any real significance in the case, but we would prefer if this could be kept together, for the safe of our records."

"Mr. Sims: Sure.

"Mr. Veazie: I would a lot rather it went in with the rest.

"Mr. Sims: All right.

"Q. (By Mr. Sims): And then, am I to understand where it says 'May—arthritis' that was apparently the diagnosis of some condition she had?

"A. Complained of at that time, undoubtedly.

"Q. And then again in June?

"A. Yes, undoubtedly what the doctor's diagnosis on what she complained of.

(Deposition of J. D. Donovan.)

“Q. What was the question mark about?

“A. He wasn’t sure it was arthritis or wasn’t, I imagine.

“Q. Is that in the handwriting of the doctor?

“A. No, that is in the handwriting of the nurse that makes that report out. The only handwriting you have in the doctors’ reports is on that blue slip.

“Q. I hand you Number 10 for identification. What is that?

“A. That is the original of the report made out that goes from the hospital to the company, for which the employee works, when they come in, and is a ticket to go see the doctor. This was one made out for Mrs. Smith, apparently, on August 9th, to go see Dr. Woerner. This was made out by Miss Lamar. Nature of illness was injury to right knee, reported previous month. This was a continuation of some other months.

“Q. I hand you Exhibit 4 for identification. Will you tell us what that is?

“A. That is the doctor’s hospital slip, which goes to the doctor, describing his diagnosis and charges for services.

“Q. That is on the stationery of the Lumbermen’s Hospital? A. Yes.

“Q. What did that record show? You can read it better than [6] we can.

“A. The record shows bursitis, with a question mark. The charge is \$20.50.

“Q. The date, please?

“A. The date is 5/16/43.

(Deposition of J. D. Donovan.)

“Q. That would be May 16th, 1943?

“A. May 16th, 1943, yes, sir.

“Q. I am handing you plaintiff's exhibit 5 for identification, and ask you to tell us what that is?

“A. Let me go back to this notice: an ‘S’ marked on this thing. That might puzzle somebody. With bursitis you could not call it an accident, so it was marked ‘S’ for sickness.

“Q. And the question mark as to what sickness?

“A. Question mark as to what sickness; the doctor wasn't sure what it was.

“Q. I am handing you Plaintiff's Exhibit 5 for identification, and ask you what that is?

“A. That is the copy of the original of the doctor and report, and the report kept in the hospital, and that goes to the company for whom the employee works.

“Q. In this case the employee was Galina Smith?

“A. Yes. It was issued to Galina Smith on May 16, '43; the nurse issuing it was Katherine Danwood.

“Q. Doctor——? A. Paul Woerner. [7]

“Q. And employer?

“A. Shevlin-Hixon Company, box factory.

“Q. What did the patient report at that time?

“A. Nature of illness—‘injured knee, hurt knee on pit, jumped into pit at box factory.’

“Q. Is it ‘job’ or ‘pit’—that first word?

“A. ‘Injured knee, hurt knee on job, jumped into pit at box factory.’ What the nurse put down

(Deposition of J. D. Donovan.)

there the girl told her—injured knee while jumping into the pit at the box factory.

“Q. At the bottom is what?

“A. At the bottom—‘Last day worked’—looks to me like second, fifteen—’43. Is that a ‘5’?

“Q. Yes, that is a five.

“A. Last day worked is May 15th. She worked until May 15th and got this ticket on the 16th.

“Q. Do those slips have the same number?

“A. Yes, ‘601’ they belong together, yes.

“Q. So they go together, covering what you have already told us. I am handing you Plaintiff’s Exhibit 6 for identification. Can you tell us what that is?

“A. That is the doctor’s slip, again, that the patient gets to see the doctor;—to Galina Smith, made out by Hilda Williams. She was at that time, she is not there any more; made to Doctor Woerner for Galina Smith, and it shows that there was a charge of \$25.25 for professional services, and [8] he has got a ‘fractured semilunar cartilage.’

“Q. That is under date of what?

“A. That is under date of June 7, 1943.

“Q. And——

“A. And this is marked here ‘Accident on the job.’

“Q. And Dr. Woerner.’

“A. Yes, Dr. Paul Woerner.

“Q. I am handing you Plaintiff’s Exhibit 7 for identification, and ask you——

“A. (Interrupting): That is part of the one

(Deposition of J. D. Donovan.)

I have, 713. This is a copy of the original that was kept in the hospital files, of reports made for accident or sickness happening to employees of either Brooks-Scanlon or Shevlin-Hixon Company.

“Q. That is a carbon copy of the original?

“A. Yes.

“Q. What does it show?

“A. Shows ticket issued to Galina Smith, June 7, 1943, by Dr. Woerner, issued by Hilda Williams, the woman aged 37; her address, 829 Delaware; worked for the company nine months. One child dependent. Date of injury 4/17/43; X-ray negative; hospital care, heat treatment; while working she jumped down to the floor and hurt her right knee. Last day worked 4/24/43.

“Q. Do you know how those dates got in there?

“A. I don't know. [9]

“Q. Referring to Plaintiff's Exhibit 8, I will ask you if you know what that is?

“A. This is something else again,—just another ticket the doctor issued July 2nd to Galina Smith. This was issued by Hulda Lamerest, nurse at the hospital; diagnosis on this seems to be fracture semilunar cartilage and bursitis of the knee.

“Q. Any question mark there?

“A. No question mark there, that I see.

“Q. Same doctor? A. Same doctor.

“Q. Handing you Plaintiff's Exhibit 9 for identification, which also bears Number 853, under date of July 2nd, what is that?

“A. That is a continuation to the report made out on each patient issued a ticket to see the doctor,

(Deposition of J. D. Donovan.)

—that works for either lumber company. Made to Mrs. Galina Smith on July 2nd, looks to me like, and this was one also made out by Hulda Lamerest, one of the nurses, to Dr. Woerner, to Galina Smith, age 37, 829 Delaware, worked for the company ten months. One son. Probable length of disability—question mark. Date of injury, May 15th. Nature of illness or injury—Injury to right knee. X-ray of knee negative as to fracture. While working on cut-off jumped in pit, strained knee. Last day worked,—May 22nd. [10]

“Q. I am handing you Plaintiff’s Exhibit 10 for identification, and ask you what that is?

“A. This is the original of the report that is issued to the company when a patient comes in and asks for a ticket to see a doctor. This was issued August 9th to Dr. Paul Woerner to Mrs. Galina Smith by Hulda Lamerest; age 37, box factory; worked for company then eleven months; date of injury May 15th; nature of illness—injury to right knee; Last day worked—May 20th.

“Q. That shows ‘date of injury—May 15th?’

“A. Yes, it shows date of injury, May 15th.

“Q. Do you know of your own knowledge when these dates are filled in in these?

“A. They are filled in at the time the ticket is issued to the patient.

“Q. I notice in referring to Exhibit 5—

“A. (Interrupting): Yes, I noticed that myself.

“Q. That is in blank? A. Yes.

(Deposition of J. D. Donovan.)

“Q. And I observe, as I think we all did or would observe——

“A. (Interrupting): Yes, I noticed that fact.

“Q. The carbon occurs to me to be rather clear in the two places, and I wondered if they could be inserted sometime after the 7th of June?

“A. I doubt that very much, because this, ‘Injured knee, hurt [11] on job, jumped into pit.’ What more probably happened,—a different nurse made this out. This nurse here and the Lamerest, are two you can pretty well depend on. This is a relief nurse, works occasionally sometimes, you don’t get the kind of reports you would like to have.

“Q. The date on this shows May 16th, that a record was made May 16th. A. Yes.

“Q. That she had hurt this knee, that she had jumped into the pit at the box factory?

“A. Yes.

“Q. Now, then, we have a record here indicating on the 7th of June——

“A. (Interrupting): That she was injured the 17th.

“Q. Injured—17th—of April? A. Yes.

“Q. I am wondering if that is an obvious inaccuracy, in view of your other records, and wanted to clear it up if it is.

“A. I am sure I would not know how to answer that question, because,—the first ticket was issued to her for injury—when was that?

“Q. You have it right before you.

“A. This here, this is the first one.

(Deposition of J. D. Donovan.)

“Q. Yes. The writing in that looks to me like it was in a different hand. Here is the slip you issued to the doctor,—referring to Exhibit 4 for identification?

“A. Yes. This here is by a different person than this.

“Q. Of course. But the ‘3’ here and the ‘3’ down here looks to me different. I am referring to Exhibit 7, where this 4/17 business appears.

“A. Yes.

“Q. You say those are different?

“A. Yes, the ‘3s’ look different, entirely.

“Q. So, rather obviously, somebody put that in later. I was wondering if you had any knowledge of that, yourself?

“A. No, I have no knowledge of that having been done, no.

“Q. Do you have any other records?

“A. No, that is all the records I have in the case.

“Q. You have no independent knowledge, yourself, of what treatment she got down there?

“A. No, no other, other than she had heat treatment, infra-red lamps, and so on.

“Q. In other words, she had passive treatment,—no claim of any surgery up there?

“A. No, nothing like that.

“Q. Your radiologist’s report on the X-ray indicates this knee, so far as demineralization,—it shows no evidence? A. No.

“Q. No arthritis, limping or——

“A. (Interrupting): No. [13]

(Deposition of J. D. Donovan.)

“Q. Of course the semilunar cartilage cannot show in an X-ray?

“A. I don’t think so. I have heard people say it can, but I don’t believe it.

“Q. As I understand it, this record you have brought, Mr. Donovan, includes all the Galina Smith records? A. Yes.

“Q. Even including in 1942 when she had a cold?

“A. Yes, that is the whole record of Galina Smith that I know anything about.

“Mr. Sims: I think that is all.”

“Cross-Examination

“By Mr. Veazie:

“Q. I notice that in these records—I won’t go through them completely—but in Plaintiff’s Exhibit 3, which I have in my hand, and which you will recognize, the right-hand column starts off—‘January—cold and bronchitis. February—cold; May—arthritis; June—bursitis,’ and so on. In those entries made in the right-hand column, indicating the nature of the illness or injury, what is the source of the information that is given there?

“A. The source of the information that is given there is the doctor’s diagnosis on the case, on the slips that come in, I imagine that is where that comes in. We don’t make the diagnoses.

“Q. It is information gained from the doctor?

“A. Yes.

“Q. Then take these other exhibits, of which

(Deposition of J. D. Donovan.)

Plaintiff's Exhibit 5 is an example, first here he says—where it says 'Nature of illness or injury,'—'Injured knee, hurt knee on job, jumped into pit at box factory.' What was the source of that information?

"A. That was from the patient herself.

"Q. That is her story?

"A. Oh, yes, that is. You notice down there on that thing, doesn't that say, in the recommendation on the statement?

"Q. In his or her own words?

"A. Yes, her own words, yes.

"Q. But in some places that is, information of that character is put under the heading of illness or injury, and sometimes it is put under the heading of patient's own statement, but I understand in all cases that was, in fact, the patient's statement?

"A. When the patient comes in and says:

 "'I want a ticket to see the doctor.'

 "'What's the trouble?'

 "'I had an accident.'

"You fill in down there how the accident happened, and there on the statement, if they come in say, 'I have a cold,' or pain in my knee, arthritis, headache, or I got the sniffles, [15] or what have you, they put that down, and it goes through that way.

"Mr. Veazie: I think that is all.

(Deposition of J. D. Donovan.)

“Redirect Examination

“By Mr. Sims:

“Q. As I understand it, the employee comes first to the hospital and then through the hospital or office is cleared as to whether he is an employee and entitled to go to the doctor? A. Right.

“Q. Then is when these blue slips are issued?

“A. Yes.

“Q. Which in effect is a certificate that—in this case—Galina Smith is an employee of the Shevlin-Hixon Company? A. Yes.

“Q. She gets this slip, and after she goes to the doctor and then this record that has been, as I understand it, executed in triplicate—I am referring now to the yellow slips?

“A. We start this thing like this—I will draw you a picture of this thing.

“Q. You will have to use numbers, using Plaintiff's Exhibits 6 and 7.

“A. Take these two, like that—the book is made like that, carbon under here, carbon under there, and—You be the [16] patient and come in.

“Q. All right. So that the Reporter will have this straight,—he has prepared three pieces of paper,—one Plaintiff's Exhibit 6, a blue sheet, number 1713; next, a white sheet that says at the top ‘Lumbermens Hospital,’ and in this particular case happens to be Plaintiff's Exhibit 10 for identification, and under that a long yellow sheet which is Plaintiff's Exhibit 7, and he has described it. For-

(Deposition of J. D. Donovan.)

getting the numbers,—this might be considered as a set and as illustrating, with me as a patient.

“A. I don’t happen to have one of those slips. The slip is brought to the hospital from the company.

“Q. I would bring it to you?

“A. Yes, you would bring it to me. All right, we take your name, that goes down here. What doctor you want to see? Now, in order to save a little time, if you will explain how the doctor is chosen—who chooses the doctor?

“A. The patients themselves. You come in.

“ ‘Hello, John, how are you? What’s the trouble?’

“ ‘I want a ticket to see the doctor.’

“ ‘What doctor do you want to see?’

“ ‘Like to see Dr. Woerner.’

“ ‘All right.’

“You fill that in. Then this carbon comes out.

“ ‘How old?’ [17]

“ ‘What department do you work in?’

“ ‘How long have you worked for the company?’

“ ‘Sickness or accident?’

“ ‘I hurt myself.’

“If it is an accident, we fill in up here: residence, how many dependents, wife, and so on. Go on down here, and ‘Nature of illness’ we put down.

“Q. You might read from it. What would she say when she first came in?

(Deposition of J. D. Donovan.)

“A. When she came in it started off like this, wanted a ticket to see Dr. Woerner. ‘Where do you work?’

“Q. This says 16th of May?

“A. Sixteenth of May. ‘How long have you worked for the company?’ ‘Seven months.’ Now, name of dependents. That was not put down here. ‘Probable length of disability.’ That is not down. ‘Date of injury’—that is not down here. ‘Nature of illness—Injured knee, hurt knee on job, jumped into pit at box factory.’ This record is taken down, like that. This was done by a nurse that isn’t on to making reports as good as she might be, I suppose. Then tear this off, and you take it.

“Q. By ‘this’ you refer to the blue slip?

“A. Yes, that goes to the doctor. This goes to the doctor later.

“Q. To the doctor? [18]

“A. No, the white slip goes to the company for which they work. This is kept in the hospital as a permanent record of the hospital.

“Q. All right, then, as I understand it, the company would have a duplicate of this slip which says, ‘May 16th, injured knee, hurt knee on the job, jumping into the pit.’

“A. Yes, they have slips of all these things.

“Q. I understand all employees of the Shevlin-Hixon mill are entitled to hospitalization, whether it is sickness or accident, at your hospital?

“A. Yes. That is, unless they reject it.

(Deposition of J. D. Donovan.)

“Q. And that is the mechanics of how the thing is done when somebody is sick or gets hurt on the job, as this lady was? A. Yes.

“Q. And this business through the hospital, comes, as I understand it, from these two mills, your hospital is for these two mills and their employees? A. Correct, sir.

“Mr. Sims: That is all.

“Recross-Examination

“By Mr. Veazie:

“Q. The two mills being Shevlin-Hixon Company and the Brooks-Scanlon Lumber Company?

“A. Correct. But one other thing,—in an emergency or anything like that, if somebody is injured and brought in to the [19] hospital we could not turn them away.

“Mr. Sims: No; that wasn't what I was getting at. I was straightening out this employer and employee matter.

“The Witness: Oh, yes.

“Mr. Sims: That is all.

“Mr. Veazie: That is all.”

Mr. Sims: We might stipulate that these exhibits might all go in evidence, without objection, so that we may hand them to the Clerk or the Court Reporter to have them marked. It would make it a more intelligible record if we used the same numbers. I wonder if we could do that? We will offer the exhibits in evidence.

(Two X-rays thereupon received in evidence and marked Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2, respectively.)

(Two sheets, chart account and register, thereupon received in evidence and marked Plaintiff's Exhibit No. 3.)

(Hospital Slip No. 601 thereupon received in evidence and marked Plaintiff's Exhibit No. 4.)

(Hospital Report No. 601, dated 5/16/43, thereupon received in evidence and marked Plaintiff's Exhibit No. 5.) [20]

(Doctor's Slip No. 713 thereupon received in evidence and marked Plaintiff's Exhibit No. 6.)

(Hospital Report No. 713, dated 6/7/43, thereupon received in evidence and marked Plaintiff's Exhibit No. 7.)

(Hospital Slip No. 853, dated July 2, 1943, thereupon received in evidence and marked Plaintiff's Exhibit No. 8.)

(Hospital Report No. 853, dated July 2, 1943, thereupon received in evidence and marked Plaintiff's Exhibit No. 9.)

(Hospital Report No. 1029, dated August 9, 1943, thereupon received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Sims: In accordance with the stipulation of counsel, I would like to read the testimony of Dr. Paul Woerner, as given at the last trial.

Mr. Powers: All right.

PAUL WOERNER

The testimony of Paul Woerner, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Sims:

“Q. You are Dr. Paul Woerner, I believe? [21]

“A. Yes, sir.

“Q. And what is your business or profession?

“A. I am a physician.

“Q. And you are practicing I believe over at Bend? A. That is right.

“Q. Are you acquainted with Mrs. Galina Smith? A. I am.

“Q. Through the courtesy of the Bailiff, I am handing you Plaintiff's Exhibit, Pre-Trial Exhibit No.—I have no numbers on these but I am handing you certain instruments in writing. I will ask you to examine them and tell us if you know what they are. They should bear numbers 1 to 13, I believe, Doctor. Perhaps you will find the numbers that I did not find. Mr. Bailiff, would you hand these also to the Doctor, please.

“A. Yes. I know what they are.

“Q. You know what they are? A. Yes.

“Q. Referring first to your X-ray examination, I see that one of these is marked No. 1. Can you tell us what this is a picture of?

“A. Picture of a knee joint.

“Q. Right or left?

“A. Why, it is probably the right.

(Testimony of Paul Woerner.)

“Q. And do you know where that X-ray was taken? [22]

“A. That X-ray was taken at Lumbermen’s Hospital in Bend.

“Q. In Bend. And of whose knee?

“A. Of Mrs. Galina Smith.

“Q. And that would be the same answer to the X-ray No. 2?

“A. Yes, sir, that is right.

“Q. Did those X-rays disclose any bony fragments?

“A. I am not a specialist but I cannot see any.

“Q. Now then, if you will, refer to the two sheets that are charged against the registry there, they are marked Exhibit No. 3; what are they?

“The Court: I have Exhibit No. 4.

“Mr. Sims: We will pass No. 3 for now. What is Exhibit No. 4?

“A. It is Lumbermen’s Hospital ticket issued by the Lumbermen’s Hospital for medical services.

“Q. And at whose—what does that instrument disclose?

“A. Well, No. 4 discloses that I saw Galina Smith at her residence on May 17th.

“Q. Now with that to refresh your recollection, Doctor, will you tell us what you observed about the right knee?

“A. I called at her residence and her right knee was moderately swollen and painful.

“Q. And what treatment, if any, was administered at that time?

(Testimony of Paul Woerner.)

“A. Well, if you recall it right, I felt it might be arthritis and I took her to my office and gave her a diathermy treatment [23] and probably prescribed for her internally, although I do not recollect that.

“Q. Now will you refer to Exhibits Nos. 5, 6, 7, 8, 9 and 10, and I am asking you the same questions as to those? I realize I am hurrying this a little, Doctor, but I know you can take it.

“A. The next one is also a slip from the Lumbermen’s Hospital authorizing medical care. At that time—let’s see. I put on this ‘Diagnosis. Fractured semilunar cartilage’, with a question mark, ‘and bursitis’.

“Q. What was the date of that?

“A. The ticket was issued on June 7th, but I saw her; at that time she was in the hospital. I saw her on Tuesday, the first.

“Q. How long did she remain in the hospital under your care, Doctor?

“A. Until she was released on June 10.

“Q. She was admitted on the——

“A. She was admitted in May. I advised her to go to the hospital in May; let me see; May 27th, and she remained at the hospital until the 10th of June, inclusive.

“Q. Were you there yourself all of this time, or did you refer her to Dr. Hosch during your absence?

“A. No. I was gone two or three days and Dr. Hosch took care of her when I was gone. [24]

(Testimony of Paul Woerner.)

“Q. And do you know what date or dates that was? A. I could not remember.

“Q. Are these your entries on the hospital slips in your handwriting? A. No.

“Q. Any of them?

“A. No; only on the blue slips.

“Mr. Veazie: On the blue slips?

“A. That is right. But not all of that.

“Mr. Sims: Q. What is your writing? That will clear that up, please.

“A. Well, this is not my writing. Oh, ‘Accident on the job’, it means. I see. That is not my writing.

“Mr. Veazie: Well then, I am probably wasting more time this way than I will be in reading Donovan’s testimony. Where did that information come from, that she had an accident on the job? Who gave you that information?

“A. Well, when any employee of five of the companies go to Lumbermen’s Hospital they give a deposition to the nurse.

“Mr. Veazie: That is, the patient gives a statement to the nurse?

“A. The patient gives a statement to the nurse what is the matter with him.

“Mr. Veazie: Is it agreed this statement regarding ‘Injury to the knee’, ‘Jumped into the pit’, and ‘Injury on the [25] job,’ that those are statements

(Testimony of Paul Woerner.)

by Mrs. Smith to the nurse or to the doctor? Will that be agreed to?

“Mr. Sims: I think that is right, your Honor. Yes. The plaintiff will be on the witness stand and we will ask her about it.

“Mr. Veazie: And as to these diagnoses, if the doctor could explain that I think we could introduce these without further attack.

“Mr. Sims: Very well. Mr. Bailiff, will you take these exhibits to Mr. Veazie, and let the witness see them:

“Q. Dr. Woerner, there was a question that Mr. Veazie just asked, and if you recall it you may answer it; otherwise we might ask it again.

“The Witness: What was that? What was the question?

“Mr. Veazie: I haven't got myself what the last question was. I was asking one thing that I would like to have made clear to the jury, is as to those notes on the right-hand side of that top sheet where it say ‘Arthritis’ or ‘Bursitis’, and eventually ‘Fractured semilunar cartilage’. Who put that down and where the information came from?

“A. That was my own writing.

“Mr. Veazie: That is your writing?

“A. Yes, that is right. It is just a diagnosis. ‘Arthritis’, the question mark, and ‘Bursitis’, the question mark. That is my writing. [26]

“Q. (By Mr. Sims): There is one other thing,

(Testimony of Paul Woerner.)

Doctor. You said when you went to this house and found this thing was swollen, was it your opinion that she had sustained an acute injury?

“A. No. At that time, as I put down the diagnosis, I thought it was possibly an arthritis, which of course was an exuberation due to the stepping in the hole or pit.

“Q. Why did you put a question mark there?

“A. Because I was not sure.

“Q. What in your opinion was the matter with the knee?

“A. Well, later on she became very sensitive from her prepatellar bursa and no question had a bursitis come with some other trouble, and during my absence Dr. Hosch looked at her and he told me he definitely found a foreign body in her left knee, so I bow to the judgment of the surgeon and make a diagnosis, fracture of the semilunar cartilage. I never felt the cartilage myself.

“Q. Do these semilunar cartilage fractures repair very ordinarily?

“A. No. They can if you put them in at rest, but as a rule they remain due to the very little blood supply and cartilage is where there is no repair itself.

“Mr. Sims: You may cross examine.

“Cross Examination

“By Mr. Veazie: [27]

“Q. You say, Doctor, your original diagnosis was bursitis, was it not? A. That is right.

(Testimony of Paul Woerner.)

“Q. And what led you to the conclusion that that was her trouble, in the first place? You might explain for the benefit of the jury what bursitis means?

“A. Ask me as an expert witness?

“Q. Well, yes. You just tell the jury what your knowledge as a physician is, what the word bursitis means.

“A. Well, the bursa is a little sac like, and covered with what we call synovial membrane. It is located around the joints and tendons and helps to lubricate the joints and avoid friction and what have you? Now if a bursa becomes infected, either through trauma or through infection—both are possible. Trauma means—well, if you hit it or hurt it, or what have you, you become—that bursa becomes inflamed and painful, and that is what you call bursitis. I don’t know. I suppose that is about right.

“Q. Well, how is this for a crude expression: Bursitis means something like inflammation of the knee joint; is that right?

“A. No. No. Bursitis means inflammation of the bursa.

“Q. Of the bursa?

“A. Which, of course, you can have—there are many bursa around a joint, and all of them could be inflamed at one time but it still would be confined as bursa to the joint. [28]

“Q. Did the conditions you found at first in Mrs. Smith’s knee lead you to believe that she had bursitis?

(Testimony of Paul Woerner.)

“A. Yes. I thought that she had traumatic bursitis.

“Q. But you are not sure of that, and later you thought it might be arthritis?

“A. I thought that at first.

“Q. Yes. And you are not aware of, and I suppose did not suspect the presence of a broken semilunar cartilage until Dr. Hosch felt a foreign object in her knee? A. That is right.

“Q. Yes. Have you seen the later X-rays that were taken by Dr. McClure?

“A. I have not.

“Mr. Veazie: I do not intend to show them to the witness.

“Mr. Sims: I will hand them to the witness.

“Mr. Veazie: Thank you. That is all, Doctor.

“Redirect Examination

“By Mr. Sims:

“Q. Doctor, is a semilunar cartilage easy and ready to diagnose?

“A. Well, yes and no. As I mentioned, I am not an orthopedist or a surgeon but a few cases of semilunar cartilage fracture on this knee give much more pronounced symptoms, like much more swelling, fluid in the joint, and what have you, but it is very difficult to make a diagnosis of a [29] fractured semilunar cartilage except when one is fortunate enough, like Dr. Hosch was, to feel a foreign body.

“Mr. Sims: I think that is all, Doctor. Thank you.

“(Witness excused.)”

The Court: Ladies and Gentlemen, we will recess until two o'clock. Kindly do not discuss this case or permit it to be discussed in your presence until it is finally submitted. The audience, according to the usual custom, will remain seated until the jurors have retired. Return at two o'clock this afternoon, please.

(Thereupon a recess was taken until 2:00 o'clock P.M.)

(Court convened at 2:00 o'clock P.M. pursuant to recess.)

Mr. Conway: If your Honor please, I think we can get through with our witnesses and depositions and introduce the exhibits this afternoon, except that Dr. Chuinard, I understand, is tied up in his office this afternoon. We can put him on at ten o'clock in the morning, if it is agreeable to the Court. Otherwise, we will have to get him down here this afternoon, if your Honor so desires, around four o'clock. We don't know how long it is going to take for these other matters. [30]

The Court: You just go ahead and try your case just like any other case and we will take care of the doctor part of it when we get to it.

Mr. Conway: I did not want your Honor to think I was going——

The Court: He has you at a disadvantage, that it all. I have heard that hundreds of times.

Mr. Conway: I wanted you to understand it. All right. Thank you.

These exhibits, No. 1 to No. 10, I understand, were received in evidence this morning.

Mr. Powers: No objection.

The Court: Yes.

Mr. Conway: Then, we have here, your Honor, also Plaintiff's Exhibit No. 11, which is a medical report of Galina Smith, consisting of two sheets; No. 12, which is a statement of income tax for the calendar year 1943 paid to Galina Smith by Shevlin-Hixon Company; then No. 14, a memorandum of final wage payment for the period of time from August 16th to August 31st, Mrs. Smith's wages at Shevlin-Hixon Company; and No. 15, which is an aerial photograph of the Shevlin-Hixon mill at Bend, Oregon; No. 16 which is entitled "Index of Employees' Written Statements"—I am taking these as they come out of this file here—and No. 17, a statement signed by Fern E. Broughton, April 25, 1944. Then, there is [31] another exhibit, No. 19—

The Court: If you have agreed to put them all in, you don't need to go over them all now. They can take the same numbers as at the other trial.

Mr. Conway: I was just identifying them for the Reporter here.

The Court: They don't need to be identified. He will find your numbers and he will know the numbers to correspond.

Mr. Conway: May I show them to the jury, your Honor, at this time after the Clerk gets them identified?

The Court: Do whatever you want to.

Mr. Conway: Would you want me to do it now to save a little time?

The Court: Don't mind about the time. We are not in any hurry. They have got numbers on them now.

Mr. Conway: That is right, your Honor, but I might say in explanation of that that some of these have two numbers. One is a pre-trial number and then there is another number, which is the suit number.

The Court: The Clerk says they were not all put in at the trial.

Mr. Conway: Some of them are not. Some of them are pre-trial exhibits.

Mr. Powers: Are you putting something in that was not in at the last trial? [32]

Mr. Conway: I don't know. I am trying to put in the ones that were introduced at the other trial. That is the reason I was calling off the numbers here.

The Court: You lawyers will have to figure out what you are going to do with the exhibits. Do it any way you want to.

Mr. Conway: I just do not want to take the time before the jury now, but if it is agreeable to counsel——

Mr. Powers: We can do it during the recess, if you want to.

Mr. Conway: I could offer this group of exhibits which I have here and give you the numbers.

The Court: I don't want the numbers. They

don't mean anything to me. I think you had better wait and take it up between yourselves during a recess.

Mr. Conway: All right, your Honor.

The Court: You will get in a mess otherwise.

Mr. Sims: I would like now to read the deposition of Dr. Hosch.

Mr. Conway: This is the deposition of J. F. Hosch. Do you want to read this?

Mr. Powers: Was he produced as a witness for the defendant?

Mr. Conway: Yes.

Mr. Powers: I will read it. [33]

Mr. Conway: The questions will be read by Mr. Powers and I will read the answers.

J. F. HOSCH

The testimony of J. F. Hosch, produced as a witness on behalf of the defendant, at the trial October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Veazie:

“Q. You are Dr. J. F. Hosch, are you not?

“A. Yes.

“Q. And what is your profession?

“A. Physician and surgeon.

“Q. How long have you been practicing?

“A. Over thirty-nine years.

“Q. And where are you practicing now?

“A. At Bend, Oregon.

(Testimony of J. F. Hosch.)

“Q. Yes. And how long have you been there?

“A. Twenty years.

“Q. Reference has been made in the testimony to an examination of Mrs. Galina M. Smith’s knee by you at Bend in the summer, I believe, of 1943. You did examine her, did you? A. I did.

“Q. And will you tell us, please, what you found at that time?

“A. I was called in to see the plaintiff, Mrs. Smith, in the absence of Dr. Woerner, who testified yesterday. It was merely a courtesy call. She was not my case, but I was pinch-hitting [34] for the doctor and went into her case briefly and she told me she had a knee that gave her trouble. I asked her about the knee and examined it. At that time I didn’t find anything but I told her—she said there was a lump or a foreign body coming in and out of her knees—to call me in when this was out. I think the next day she called me in and I found this foreign body of the knee protruding a little on the inside, right in the bight of the knee. I would judge this was about the size of a small hazelnut. I think I saw her a few times after that. I told Dr. Woerner, when he came in, what I had found and we made an X-ray of the knee but we didn’t find at that time any foreign body. I don’t think I have seen her or waited on her since that time.

“Q. Yes. An X-ray would not show a loose piece of semilunar cartilage, would it?

“A. It would not show a cartilage.

“Mr. Veazie: Yes. I will ask that the witness

(Testimony of J. F. Hosch.)

be shown now Exhibits 1 and 2, I believe it is, the X-rays that were taken there in Bend.

“The Court: Did he see her before or after the accident? A. After.

“The Court: He has not covered that in his testimony.

“Mr. Veazie: Oh, yes. Well, I will ask him to do so.

“Q. This was after the 15th of May, was it not, Doctor? [35] A. Yes.

“Mr. Veazie: Very well.

“Mr. Sims: He didn’t testify where he had seen her yet.

“The Witness: This was at the Lumbermen’s Hospital.

“Q. (By Mr. Veazie): In Bend?

“A. I happen to have this upside down.

“Q. Now that X-ray does not show any apparent body, does it, or as you can perceive?

“A. This is 2391. I don’t see anything in 2391 that would mean much to me. In the same manner on the other side there is a little opposite that could be a bony substance. That is all I can see on those two pictures.

“Q. In view of your finding of this foreign body in her knee, and in view of those X-rays, how did you diagnose her trouble at the time?

“A. Well, the first impression you get from a floating body in the joint, from our experience, which is general, and not as a specialist in the par-

(Testimony of J. F. Hosch.)

ticular line of bones of an orthopedist, that is really our first thought—a floating cartilage from a semilunar cartilage.

“Q. And was that your diagnosis of this, then?

“A. It was my guess. Feeling the foreign body to me didn’t mean anything but a foreign body. I could not tell from the feel of it whether it was bone or cartilage. That was merely the quick diagnosis at that time. [36]

“Q. Now will you show the doctor the X-rays taken by Dr. McClure. They have his name on the outside of the envelope.

“A. This is Exhibit 31, which shows a definite bony body of the thigh-bone or femur. That is entirely a foreign body—should not be there.

“Q. Could that be a piece of cartilage?

“A. It could not, because it is bony.

“Q. Yes. Does the other X-ray now in front of you show the same? I don’t know whether it does or not. You will have to say.

“A. Yes, it does definitely show the same body?

“Q. Yes.

“A. It happens to be on this side.

“Q. Now in view of these later X-rays what do you say as to the correctness of your original diagnosis that you had felt a piece of semilunar cartilage?

“A. Well, at the time, as I say, it was merely a foreign body. From what I have learned since then the information and the more complete knowledge, I would have to say that I would have to

(Testimony of J. F. Hosch.)

change my diagnosis; by the mere evidence of this picture alone it would show me that it was bony in place of cartilaginous.

“Q. Yes. Have you formed any opinion as to the probable origin of that bony particle? [37]

“A. I have not.

“Mr. Veazie: I think that is all.

“Cross Examination

“By Mr. Sims:

“Q. Doctor, are you sure that you did feel something in there when she was there at the hospital in Bend?

“A. As sure as a man could be.

“Q. And as a result of that, those X-rays were taken there at Bend to see if you could find it?

“A. Yes.

“Q. And those X-rays, as I understand your testimony, do not disclose any bony substance; is that correct?

“A. I could not find them at that time.

“Q. But you did feel something?

“A. Yes.

“Q. Is the bony substance that you see in these plates that were made a year later in such a position, if you know, that it would cause a locking of that joint?

“A. Any foreign substance could cause a locking of the joint.

“Q. The position that this is in, though, if it didn't move around?

(Testimony of J. F. Hosch.)

“A. Well, I don’t think it would cause a locking up there so much, but it could still interfere with the motion.

“Q. It would be painful, but it could not lock the joint in that position, could it? [38]

“A. Well, that is theoretical. Some people, with the least pain in the knee-joint, they are going to think it is locked whether it is locked or not. They are going to quit right there.

“Q. You heard Dr. Chuinard’s testimony that the pictures taken in Bend did not show any foreign substance, didn’t you? You were here, weren’t you? A. Yes.

“Q. And that if the substance had been there and easy to see at that time in his opinion these X-rays would have shown it? Do you agree with that statement?

“A. Well, I can’t account for the fact that they did not show and show it later. I am unable to say.

“Q. If, doctor, there was a semilunar cartilage fracture that did move around, and does move around, and that you really did feel it, and then later on this other foreign substance, this bony thing came loose, would that not be consistent with the X-rays that were taken there at the Bend hospital?

“A. That is quite a hypothetical question you are putting at me.

“Mr. Sims: That is right.

“The Witness: Would you state it again, please.

(Testimony of J. F. Hosch.)

“Mr. Sims: The Reporter will help us.

“(Last question read.)

“Q. Well, I would say that question could be answered, that [39] it was.

“Mr. Sims: I think that is all, doctor.

“Q. Well, there is one other thing: Will this knee ever in your opinion be a normal knee, surgery or no surgery?

“A. An operation should—it is easy to remove and she should practically get a good result.

“Q. If, as in the opinion of Dr. Chuinard, there is both damaged cartilage and then later developed this bony thing but on top of that a roughness there in the sides, the top of that femur, how would the surgery, removing that cartilage and this little bony fragment, improve the roughness of that socket—of the femur, I would call it?

“A. Well, the removal of the foreign bodies and the future irritation, which may be a factor and is a factor in this roughening, and then after they are removed with rest, manipulations, physiotherapy, massage, and so on, would have a tendency to build that up pretty well.

“Q. Well, will it ever be as good as it was before this experience, in your opinion?

“A. No, I don't think it would become perfect.

“Q. And would you say the reasonable value of hospitalization and the care by a specialist, an orthopedist, would be about \$400.00? Would you say that is a conservative estimate of the expense of that type of treatment?

(Testimony of J. F. Hosch.)

“A. Oh, \$400 I would say is a pretty good fee. That includes [40] the doctor and the hospital.

“Q. That is what I mean. A. Yes.

“Q. Would you say that is reasonable?

“A. Well, that is reasonable. That is good for me, too. Nobody is going to starve at that kind of work.

“Mr. Sims: I think that is all. Thank you.

“Redirect Examination

“By Mr. Veazie:

“Q. I may have misunderstood you, doctor. I thought you said on your direct examination that in that X-ray taken at Bend you did deduct something that might have been a foreign body. Is that correct, or am I wrong?

“A. I think, yes, it shows some calcification, but it seems to be much simpler than this bone I see in the second picture. I wanted to qualify that answer by saying that one series of pictures don't always locate anything. That is, they may not be so well taken; they may not be so well developed, and the position is often a factor in deciding. We often have to take a series of pictures before we find what we want.

“Mr. Veazie: Yes. That is all.

“Recross Examination

“By Mr. Sims:

“Q. Doctor, you examined Mrs. Smith before she went to work for Shevlin-Hixon, didn't you?

“A. Yes.

(Testimony of J. F. Hosch.)

“Q. And did you at that time flex these knees and examine her for strength and pain and that sort of thing?

“A. Well, this is rather a superficial examination and a general examination. We are not looking for defects of this kind. We do make a thorough checkup as to ordinary defects, but on her examination of her knee, I had the applicant move that knee, flex it, and noticed that there was no swelling about the knee, and that is about all I made at that time.

“Q. And there was no history, I believe, though, at that time, of any lameness or difficulty of the knees prior to her going to work for Shevlin-Hixon, was there?

“A. None that she told me about.

“Q. Yes. And did you observe any lameness, or anything of the kind? A. No.

“Q. When we took your testimony there in Bend, did you feel that in your opinion she had a loose internal semilunar cartilage?

“A. At the time, as I say, it was a foreign body and my diagnosis at that time was, I thought it could be or should be a cartilage.

“Q. Well, did you make this answer: ‘Well, we had an X-ray made, which was negative, but in examining her I probably examined her two or three times. At one time I found a [42] cartilage that was out, so I could definitely feel it. It slips in and out. You might have examined her a dozen times and not found it.’ Is that right?

(Testimony of J. F. Hosch.)

“A. I think that is my answer at that time.

“Mr. Sims: Yes. I don’t think of anything else. I know he wants to go back to Bend, so I have been keeping that in mind.

“Redirect Examination

“By Mr. Veazie:

“Q. Counsel has now opened up this thing of the examination when Mrs. Smith went to work for Shevlin-Hixon Company. Did you find in that examination any evidence of any previous accident that she had had?

“A. No, I did not. You mean to this knee?

“Q. No. About any other accident that she had had.

“A. If I had I would have put it in the examination record, and I don’t think there is any such evidence in the record.

“Q. Your record—you can refer to it if counsel is not satisfied. I think it appears in the deposition that you refer to heparotomy. What is that?

“A. Laparotomy.

“Q. Yes.

“A. That is an abdominal operation.

“Q. But that would not signify the existence of any accident?

“A. No. That was an operation. [43]

“Mr. Veazie: Yes. Very well. That is all.

“Mr. Sims: I think that is all, doctor. Thank you.

“(Witnessed excused.)”

Mr. Conway: We will read the deposition of
HOPE H. CLARK.

The testimony of Hope H. Clark, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Sims:

“Q. Mrs. Clark, I am going to be very brief with you. I believe you live in Bend?

“A. Yes, sir, I do.

“Q. And you are, I believe, a punk, employed at the Shevlin-Hixon Box Factory?

“A. I wasn't punk at this time.

“Q. Were you in May of 1943?

“A. Was I punking in May of 1943?

“Q. Yes. A. I believe so.

“Q. Do you know Galina Smith? A. Yes.

“Q. How long have you known her?

“A. About ten years.

“Q. And has she been crippled at any time prior to May of [44] 1943? A. No.

“Q. Do you know of your own knowledge whether or not——

“Mr. Sims: Strike that.

“Q. Do you know of your own knowledge how the punks got in and out of their working position in May of 1943, out of 3, 4 and 5?

“A. They went up over the catwalk and stepped over the step right onto the table and went down in, or else they went over the rolls.

“Mr. Sims: You may cross examine.

(Testimony of Hope H. Clark.)

“Cross Examination

“By Mr. Veazie:

“Q. I didn’t catch the last part of your answer.
Or else what?

“A. They went up over the catwalk and stepped there, went down the three steps and stepped there; and stepped right on the table and went down in, or those that crawled over the rolls.

“Q. Over the rolls? A. Yes, sir.

“Mr. Veazie: Well, that is all right.

“Redirect Examination

“By Mr. Sims:

“Q. Were the rolls power-driven rolls? [45]

“A. I don’t know.

“Q. Which was the safest method of getting in?

“A. Up over the catwalk.

“Mr. Sims: That is all. Thank you.

“(Witness excused.)”

Mr. Conway: I will now read the testimony of

LAURA SNODGRASS.

The testimony of Laura Snodgrass, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Sims:

“Q. You are Laura Snodgrass?

“A. That is right.

(Testimony of Laura Snodgrass.)

“Q. Whereabouts do you live, Mrs. Snodgrass?

“A. I live in Bend.

“Q. Do you know Galina Smith?

“A. Yes, I do.

“Q. About how long have you known her?

“A. Oh, around twenty years.

“Q. How often have you seen her through the years?

“A. Oh, I have seen her maybe at least twice a month anyway.

“Q. Have you visited in her home?

“A. I have been in her home lots of times. [46]

“Q. And she in yours? A. Yes.

“Q. And do you know of your own knowledge whether she was crippled prior to May of 1943?

“A. No, she was not.

“Q. And did you see her on the 16th or 17th of May, 1943, in Bend?

“A. Well, I don't know the exact date.

“Q. Well, was it within a day or two after she had come from the hospital, do you know? If you are not sure, why, you say no, that you don't know.

“A. Well, I saw her one day up town after she got hurt when she was going to the doctor.

“Q. And what was her condition then, as to whether—well, just what was her condition as you observed?

“A. Well, she was limping and she was going to the doctor for treatments for her knee.

“Q. Had she ever been ill prior to that time?

“A. Not to my knowledge.

“Mr. Sims: You may cross examine.

“Mr. Veazie: No cross examination.

“(Witness excused.)” [47]

Mr. Conway: I will now read the testimony of
FRANCES HASTINGS.

The testimony of Francis Hastings, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

“Direct Examination

“By Mr. Sims:

“Q. I believe you are Mrs. Frances Hastings, are you not? A. I am.

“Q. Were you employed at the Shevlin-Hixon Box Factory in May of 1943? A. I was.

“Q. And what type of work did you do?

“A. Well, I did several things.

“Q. Did you ever work as a punk?

“A. Yes, I did.

“Q. And do you know whether the rolls that were used at 4 and 5 were power-driven rolls in May of 1943? A. Yes, they were.

“Q. They were what?

“A. They were power-driven.

“Mr. Sims: You may cross examine.

“Cross Examination

“By Mr. Veazie: [48]

“Q. When did you go to work there, Mrs. Hastings? A. In April, '43.

“Q. In April, '43? A. Yes, sir.

(Testimony of Frances Hastings.)

“Q. And you were doing punking work right after that, were you?

“A. Well, I worked there six weeks and I punked the last week I worked there.

“Q. Well, all right, sometime in April; and then you were there six weeks and punked for one week. And on any particular saw?

“A. Well, I punked on Number 3 cutoff, I am pretty sure.

“Q. Yes. And can you fix more accurately that week when you were doing that punking work?

“A. Well, the last day I worked there was the 29th of May, '43.

“Q. The 29th of May. And you had been punking then for a week?

“A. Well, just about a week.

“Q. Yes. Very well. And you say at that time the rolls were power-driven?

“A. They were.

“Q. Had you ever observed them prior to that time?

“A. Observed them prior to that time?

“Q. Yes; prior to the time when you worked there for a week on that cutoff saw?

“A. Well, I knew they were power-driven and they were dangerous, [49] and they seemed too dangerous to even attempt to go over, so I never even attempted to.

“Q. I mean, previous to the time when you were working with one of these cutoff saws, did you know anything about the rolls?

(Testimony of Frances Hastings.)

“A. Well, I didn’t work around the rolls much.

“Q. Except that one week?

“A. Except when I was on that one job.

“Q. Yes. And you were satisfied that at that time they were power-driven? A. Yes.

“Mr. Veazie: That is all.

“Redirect Examination

“By Mr. Sims:

“Q. Mrs. Hastings, you then—if you see certain things to go through, to go over, you then would get into this position?

“A. Well, the only way you could get in, you could go up the stairs and walk out on the catwalk and down the stairs and go over the railing and jump down onto the floor.

“Q. And about how much of a jump was it?

“A. Well, I should judge it was three feet, at least that you had to, or more.

“Mr. Sims: That is all.

“(Witness excused.)” [50]

Mr. Powers: Do you want to read the testimony of Galina Smith?

Mr. Conway: No. We have another witness here, W. T. Curtis.

W. T. CURTIS

The testimony of W. T. Curtis, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

(Testimony of Frances Hastings.)

“Q. And you were doing punking work right after that, were you?

“A. Well, I worked there six weeks and I punked the last week I worked there.

“Q. Well, all right, sometime in April; and then you were there six weeks and punked for one week. And on any particular saw?

“A. Well, I punked on Number 3 cutoff, I am pretty sure.

“Q. Yes. And can you fix more accurately that week when you were doing that punking work?

“A. Well, the last day I worked there was the 29th of May, '43.

“Q. The 29th of May. And you had been punking then for a week?

“A. Well, just about a week.

“Q. Yes. Very well. And you say at that time the rolls were power-driven?

“A. They were.

“Q. Had you ever observed them prior to that time?

“A. Observed them prior to that time?

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“A. Well, I knew they were power-driven and they were dangerous, [49] and they seemed too dangerous to even attempt to go over, so I never even attempted to.

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(Testimony of Frances Hastings.)

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W. T. CURTIS

The testimony of W. T. Curtis, produced as a witness on behalf of the plaintiff, October 31, November 1-2, 1944, was thereupon read as follows:

(Testimony of W. T. Curtis.)

“Direct Examination

“By Mr. Sims:

“Q. You are W. T. Curtis, I believe, and in 1943 you were employed at Shevlin-Hixon Box Factory; is that correct? A. That is right.

“Q. And what were you doing in May of 1943 there in the box factory?

“A. In May, 1943? Well, I couldn't say exactly but I was doing various jobs, running a rip-saw and various things they have to do.

“Q. And do you know Galina Smith? Did you know her then? A. Yes.

“Q. Did you see her in the evening of May 15th, 1943?

“A. Well, I don't know whether I did or not. I don't remember I did.

“Q. Well, did you see her the evening that she was brought back from the hospital?

“A. Yes, sir. [51]

“Q. And did you observe her condition?

“A. Yes, sir.

“Q. What was it?

“A. She seemed to be crippled in one leg.

“Q. Had she been crippled before?

“A. Not that I know of, no.

“Q. What did she do when she came back from the hospital that night?

“A. Well, she was punking for me, working with me for this rip-saw.

(Testimony of W. T. Curtis.)

“Q. Did she have to jump in order to get into the position of it? A. No.

“Q. What was the number there?

“A. The number of the saw?

“Q. Yes. Was it a high cutoff saw at all?

“A. No. It is a different saw altogether.

“Q. Well, how would they get into the working position there? A. Just walk up to it.

“Q. Just walk up to it? A. Yes.

“Q. There wasn't any table to climb over?

“A. No.

“Q. I see. And, well, you go ahead and tell now what she did when she came back from the hospital. You said she was [52] crippled. Now what did she do?

“A. Well, as I would present her lumber, she would take it away from the table and put it on a little truck and we would get a truckload. If we would have to move the truck away from the saw, change the trucks and——

“Q. Could she do that alone?

“A. No. As a rule, it takes two persons to do that. A good and strong one might do it but she wasn't able to do that that night.

“Q. How was the truck removed then? Who did that?

“A. Well, I pushed and then someone else, I don't remember who.

“Q. Did Mrs. Smith do any pushing on that truck? A. No.

(Testimony of W. T. Curtis.)

“Q. Do you remember whether the rolls were——

“Mr. Veazie: I didn’t catch the answer.

“Mr. Sims: I beg your pardon. Would you give us the answer, Mr. Person?

“The Witness: No.

“Q. Were those live rolls there at the high cut-off saws? A. Yes, I think they were.

“Mr. Sims: You may cross examine.

“Cross Examination

“By Mr. Veazie:

“Q. Her job, after she came back that night, was to take [53] boards from your rip saw and lift them over onto the truck? That was it, was it?

“A. Yes.

“Q. She was able to do that all right, was she?

“A. Well, seemed to be, yes, sir.

“Q. And how long did she continue to do that work?

“A. I don’t remember what time of night, or anything about it, but she finished the rest of the evening with me, after she come back from the hospital.

“Q. You don’t remember, though, what the hours were? A. No, sir.

“Q. What is your ordinary quitting time there on the night shift?

“A. One o’clock, I think; one-thirty. I don’t remember just when.

“Q. Then perhaps we can ascertain otherwise when she got back from the hospital to the box factory. You don’t remember that?

(Testimony of W. T. Curtis.)

“A. I don’t remember when she come back.

“Q. Yes.

“A. Well, in fact I didn’t know she was gone, because I wasn’t working with her.

“Q. Well, when did she start to work with you? Have you any idea as to the hour?

“A. After she come back from the hospital. [54]

“Q. All right. Do you know approximately what time that was? A. No, sir, I don’t.

“Q. No idea at all? A. No, sir.

“Q. And I understand you to say that ordinarily the moving of one of those trucks is a job for two persons? A. Yes, sir.

“Q. A woman does not undertake to do it even if she is in good health, I understand?

“A. Yes, sir; she does.

“Q. I beg pardon? A. She does.

“Q. Alone? A. No, sir.

“Q. But she has helped? A. Yes, sir.

“Q. A woman helps on the job if she is in good, sound, physical condition? A. That is right.

“Q. About these rolls, was there ever a time when they operated by gravity?

“A. Well, I couldn’t say.

“Q. You don’t know? A. No, sir.

“Mr. Veazie: That is all. [55]

“Redirect Examination

“By Mr. Sims:

“Q. When did you go to work there at this mill?

“A. I think it was April, ’42.

(Testimony of W. T. Curtis.)

“Q. I see. And to get back now to '43, how would these punks get in and out of their working positions by the high cutoff saws?

“A. Well, your girl there would go up these steps and over this catwalk, they call it, and step over and jump off into where they were.

“Q. I think that is all. Thank.

“(Witness excused.)” [56]

BETH NORTON

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. You are Beth Norton? A. I am.

Q. You live over in the Bend country, don't you? A. I do.

Q. Whereabouts were you living back in 1942 and 1943? A. The same place I am right now.

Q. Over in Bend? A. Yes.

Q. Were you employed at that time?

A. Pardon me?

A. Juror: Louder, please.

Q. (By Mr. Sims): As I have it in mind, you are a sort of a war wife. Your husband had been in New Guinea? A. Yes, he was.

Q. And you were working?

A. Yes, I was, at that time.

(Testimony of Beth Norton.)

Q. You were working while your husband was overseas? A. Yes.

Q. You worked, whereabouts?

A. Shevlin-Hixon Box Factory. [57]

Q. During the time you worked for the defendant, did you know Mrs. Galina Smith?

A. Yes, I did.

Q. Had you known her before? A. No.

Q. Did you know her at the box factory during that entire ten or eleven months that she was employed there? A. Yes.

Q. You saw her about how often?

A. Every day.

Q. Did you observe her as she walked and moved around prior to May when she says she was hurt?

A. Yes.

Q. Did she limp or have any defects as far as walking around was concerned?

A. Not that I could see.

Q. Did she develop any limping or "trick" knee or difficulty during the month of May?

A. After she was injured, she did.

Q. We are agreed that this occurred—the record shows that it was in May, 1943, so do not be troubled about the time, if that was the time. If it was May, 1943, that is the same time we are talking about when she developed this knee trouble. In other words, I am not trying to ask you if it was the 15th of May, 1943. I am trying to ask you if [58] you know whether that was the same time that she went

(Testimony of Beth Norton.)

to the hospital when she was hurt, that she developed this "trick" knee or knee trouble?

A. Well, I would say that it was.

Q. What were your duties at the Shevlin-Hixon Box Factory?

A. Well, I was called a relief woman.

Q. Well, would you elaborate on that? You tell us what your duties were as relief woman?

A. The relief woman goes around and takes the place of the girls as they take a ten-minute rest period.

Q. Did that require you, then, to work at all of these different pits? A. Yes, it did.

Q. Do you know how you were required to get in and out of these pits?

Mr. Powers: She should answer how she got in and out.

Mr. Sims: I will reframe it.

Q. How did you get in and out of these pits?

A. Walk up the stairway and onto the catwalk and down four or five steps to a lower catwalk and crawl out over the side on the steel table and jump to the floor.

Q. Did you sit down and gently slide off as Mr. Powers has indicated to the jury in his opening statement? Go up just as easy and then slide off real easy, like that (illustrating)?

A. No, I didn't. [59]

Q. How did you get in there?

A. Well, to sit down like and slide off onto the

(Testimony of Beth Norton.)

floor would be doing something. It just comes natural to jump off. You don't slide off.

Q. Were you the only relief woman? Were you required to move from place to place?

A. Well, yes. They have only just one relief woman at a time. However, if I was not present, there was another girl to take my place.

Q. On the night shift, would the punk have to move from one pit to the other?

A. Yes. Yes, they do.

Q. Would she get in in the same way, step over onto this table and then jump in? A. Yes.

Q. Do you know about how high these work tables were from the pit?

A. Well, I would say right about that (illustrating).

Q. Will you stand up and indicate to the jury about where that would strike you?

A. (Illustrating).

Mr. Powers: It is a little difficult to get that in the record.

Mr. Sims: I would estimate around three feet.

A. Around three feet. [60]

Q. Did you wear a belt or anything of the kind?

A. Yes.

Q. An apron?

A. Yes, wear a leather apron.

Q. Would that be worn at about the waist?

A. Yes, if you don't wear a leather apron you could not keep any clothes. The edge of the steel table would wear them out in any time at all.

(Testimony of Beth Norton.)

Q. Would you say that it would strike you about that spot (indicating)?

Mr. Powers: She has already made this indication. If she wants to step down, I think maybe she can show us.

Mr. Sims: If you will step down.

The Court: Don't you know the exact height?

The Witness: Thirty-three inches.

Mr. Conway: No, your Honor.

The Court: Would they vary?

Mr. Powers: They do not vary at all.

The Court: Wait a minute. One at a time.

Mr. Sims: I think they do.

The Court: I am talking to one of you at a time. I am talking to Mr. Sims.

Mr. Sims: These pits are not the same distance from the work table. I have yet to go into that.

The Court: I am going into it now. Don't you know [61] exactly what the height of the table was from the floor of the pit?

Mr. Powers: I think it was thirty-three inches.

The Court: Can't you agree? Don't you know? Do you mean to tell me that since this case was tried you people did not take any measurements of the table?

Mr. Sims: We took measurements. That is where we say it was.

The Court: We are talking about one pit. Let us not talk about any different pit. Your contention is going to be that where this woman got

(Testimony of Beth Norton.)

down this table was thirty-seven inches to the floor?

Mr. Sims: That is right.

The Court: What is your contention about that, Mr. Powers?

Mr. Powers: Thirty-three inches, your Honor.

The Court: All right. Go ahead.

Q. (By Mr. Sims): How was the floor of these pits covered?

A. Well, where you stand, on account of shifting back and forth, the floor wears, and they had replanked some of them.

Q. Were you around the evening of the 15th of May when she went to the hospital?

A. No, I was not.

Q. You were not there at that time?

A. No. [62]

Q. There has been some talk about rolls, whether they were gravity rolls or power-driven rolls. I do not care particularly about that, but do you know whether they were power-driven or gravity rolls?

A. They were power-driven rolls.

Q. What is the difference between power-driven rolls and gravity rolls?

A. Well, gravity rolls slant and you set your boards on them and they will carry those away. The power-driven rolls has a belt that runs underneath. They run at all times.

Q. As I understand, the power-driven rolls, one roll would be a little bit below the other. Let us say that these are the rolls here (illustrating). It would be somewhat in this fashion. I will try to get this

(Testimony of Beth Norton.)

a little lower, about in that situation. With the gravity rolls with the weight put on there, the gravity would make it slide along? A. Yes.

Q. But the power-driven rolls will be nearly level? A. Yes.

Q. And there will be a belt underneath pushing up against it and forcing the roll to turn, is that correct? A. That is right.

Q. Do I understand those rolls enclose and make the fourth side of that box or pit that you punks work in? A. The power-driven rolls? [63]

Q. Yes.

A. I would say about the same height as that steel table, approximately.

Q. About the same situation? A. Yes.

Q. Do you know how the women who worked as punks were dressed? How did you dress, for instance?

A. All of the girls wore slacks or overalls.

Q. That is what I mean. Was this room a heated room or a cold room? I want to know whether the temperature was——

A. You mean the place where we rested or the place we worked?

Q. I do not mean the rest rooms. I mean the place where you worked, punking.

A. Well, it was supposed to be heated.

Q. Was this steel covering on the work bench cold on a cold day? On a cold day would the steel be cold? A. Well, I hope to tell you.

Q. It would be cold? A. Very much so.

(Testimony of Beth Norton.)

Q. Did you see this mill about a month after the case was filed? The case was filed, I believe, in March. Did you see this mill in April?

A. Yes.

Q. Had they made any changes in this box factory? Particularly, now, I call your attention to the rolls. Was there [64] any change made?

A. I don't just definitely——

Q. Were the rolls removed?

A. I don't just definitely know when they removed them rolls, but they took them out over the week end and when we come to work on Monday morning no rolls were in there, power-driven rolls.

Q. How, then, is the material carried away from the front of the working place there when the rolls are gone?

A. Take them—take your boards off the steel cable, turn around and set them on the rolls, which carried them away.

Q. Where do you have to jump to get into working position now?

A. Well, you don't have to jump now. You can just absolutely walk right in there.

Q. It is right on the level?

A. Right on the level.

Mr. Sims: Dr. Chuinard is here. Mr. Powers has agreed that I might withdraw this witness and put the doctor on.

The Court: Yes.

(Witness temporarily excused.) [65]

DR. E. G. CHUINARD

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. You are Dr. E. G. Chuinard? A. Yes.

Q. What is your business or profession?

A. I am a licensed physician and surgeon in the State of Oregon, specializing in orthopedics.

Q. What is meant by orthopedics?

A. Orthopedics is described as a medical specialty that deals with disabilities and deformities of the apparatus of locomotion, which has to do with the muscles, nerves, blood vessels, bones and so forth.

Q. You were associated with Dr. Dillehunt, Dean of the Oregon Medical School, for many years?

A. Yes.

Q. And Dr. Lucas? A. Yes.

Q. And Dr. Buck and, who else?

A. Dr. Buck and various others.

Q. Your offices are in the Medical-Dental Building? A. Yes.

Q. What, if any, hospitals are you connected with here in [66] Oregon?

A. I am on the staff of the University of Oregon Medical School Hospital and Clinics, including medical and tuberculosis; the Doernbecher Hospital, the Portland Sanitarium, Emanuel Hospital, and Shriners' Hospital for Crippled Children.

(Testimony of Dr. E. G. Chuinard.)

Q. You are doing orthopedic surgery for crippled children at the Shriners' Hospital?

A. Yes, Dr. Lucas and I do work there.

Q. You have been doing that for several years?

A. Yes.

Q. This morning, you were in the Emanuel Hospital and had about four or five operations up there this morning?

A. That is right.

Q. For about how many years have you now limited your practice to bone work?

A. Since 1938.

Q. Are you acquainted with Mrs. Galina Smith?

A. Yes, I am.

Q. When did you first see her?

A. I first saw her in my office May 23, 1944, at which time she came to me for an examination.

Q. What examination did you make?

A. I examined her in reference to a chronic disability of her right knee. [67]

Q. Did you make X-rays?

A. Yes, I did.

Q. Do you have those plates with you?

A. Yes, I have the ones that I made in my office when I re-examined her yesterday, but I do not have the first ones.

Mr. Sims: I wonder if we might have the screen so that the doctor could use it, your Honor.

The Court: Yes.

Q. (By Mr. Sims): While they are having this set up, I wonder if you could explain to us the structure of the knee, what bones and ligaments or carti-

(Testimony of Dr. E. G. Chuinard.)

lages are included in the knee, what makes up the knee?

A. The knee joint is made up of the femur or thigh bone and the tibia, or shin bone, the bone below the knee, and the patella or knee-cap. Those are the three bones that enter into the knee joint. Then, inside the knee joint are two sets of cartilages, one known as the articular cartilage which covers the ends of the bone, that the bones articulate on. Then, there is another set of cartilages, two of them, called the semilunar cartilages, which are little semilunar-shaped pieces of cartilage around the edge of the joint and which are not weight-bearing in function.

Q. What effect would normally be had upon a knee joint of a lady that weighs 165 pounds, making repeated jumps to a solid floor 35 inches? [68]

Mr. Powers: We will object to the question, if your Honor please. It is not a proper question. The doctor has treated Mrs. Smith and he has the history given by Mrs. Smith as to what she claims, how she claims this accident occurred. I think their testimony should be confined to that, rather than to speculate.

The Court: It would be better to ask that question later.

Mr. Sims: All right. I will withdraw it.

The Court: All right.

Q. (By Mr. Sims): You have now in your hands a series of X-rays. Will you take them in

(Testimony of Dr. E. G. Chuinard.)

their chronological order and tell us what they show? If you wish to use the screen, you may do so. It would be helpful perhaps.

Exhibit No. 1 is the one I would like you to start with. A. This is an interior view.

Q. What do you mean by "anterior?"

A. This is an anterior view of a knee joint, which is an X-ray made looking straight at the knee, from front to back. It shows some roughening on the lateral, what we call the lateral condyle of the femur; a definite offset—no articular cartilage and bone at that point—

A Juror: I would like to ask a question. Is that permissible? [69]

The Court: Yes.

A Juror: Is it true that with anyone 165 pounds and about thirty-six years of age that it would have a roughening like that in a normal knee joint?

A. No, that is not the normal finding.

Q. (By Mr. Sims): Is there any other abnormality in the knee?

A. There is possibly a slight depression in the lateral tibial plateau, the tibia being this area in here (indicating). That is a little deeper than you usually see and there is a little roughening there.

This other X-ray I believe is No. 2 and is a lateral view of a knee joint, and it shows some roughening of the tibial plateau and a little opaque shadow—there is a definite roughening of the articular cartilage of the femur. These things I have described are not normal findings.

(Testimony of Dr. E. G. Chuinard.)

Q. Is there any, what we call, arthritic lipping?

A. No, not in any of these films.

Q. If you will take the next in order, Doctor——

A. This is Exhibit No. 3, which is a lateral view of a knee joint. It shows, in addition to the findings previously described, a definite opaque foreign body which I am pointing to with my thumb.

Q. Before you leave that definite opaque body you have [70] there under your thumb, will you tell us whether that is in such a position as would normally cause a locking of the knee?

A. Of course, there must be some clarification of the term "locking." Patients often describe that as any sort of catching sensation, without the knee being completely locked. I doubt if it would cause a complete locking in that position, but it would—you can see the articulation of the patella or knee-cap as it rotates on the lower end of the femur (indicating).

These bodies are often larger than we see in the X-rays. There is tissue with calcium in it. A true cartilage, without any bony or calcified substance in it, will not show in X-rays. That is why that space is shown. Actually, if the space does not exist (indicating) there is cartilage there.

Q. In other words, the top of this sleeve bone, this femur, is made solid with the tibia, and made so by intervening cartilage, is that right?

A. Yes.

Q. The X-ray, however, makes it appear that the bones just stick out in space.

(Testimony of Dr. E. G. Chuinard.)

A. This Exhibit No. 34 again demonstrates the roughening previously described. This is an anterior view of the knee joint. [71]

This Exhibit No. 35 is an anterior view of the knee joint and, again, shows roughening.

Exhibit No. 36 is another anterior—a lateral view of the knee joint, which shows the same findings previously described, including an opaque foreign body.

Q. Including an opaque foreign body in the same area as shown by the previous films?

A. Yes. I have the X-rays made in my office yesterday.

Mr. Sims: With your Honor's permission, we would like to have the doctor refer to those.

Mr. Powers: No objection.

Q. (By Mr. Sims): Go ahead, Doctor.

A. This is one film which shows the true position of the knee, anterior view. It still depicts the roughness in the lateral side of the knee joint and the foreign body in the same position demonstrated in the lateral view.

Q. Doctor, based upon a study of the X-rays which you have referred to—turn that light on, if you want to—and which we have introduced here and which we have agreed were made over a period of more than three years, would you say that this foreign body is moving about in this knee?

A. It has not moved in the X-rays, the X-ray demonstrations, at all.

(Testimony of Dr. E. G. Chuinard.)

Q. Have you made any examination of her recently? A. Yes. [72]

Q. You said you did yesterday? A. Yes.

Q. What, if anything, did you observe or discover yesterday, in your examination?

A. For the first time, on all the occasions that I examined Mrs. Smith, she was able to show me what she has always described, and that is that this foreign body is very superficially placed; at times she can feel it and push it around. That, I was able to see yesterday.

Q. In your opinion, is this object you felt moving around, is that the same thing as this foreign substance?

A. It could be the same thing. I believe it is.

Q. You feel that there is some semilunar cartilage in this knee that is moving about?

A. I think there seems to be some injury to that semilunar cartilage, on the lateral side of the knee joint. I do not believe these bones could come together with such an impact without doing some damage to the semilunar cartilage.

Q. When the semilunar cartilage is damaged, will that damage repair itself with the passage of time, like a kink in a muscle?

A. Neither the semilunar cartilage nor the articulating cartilages repair themselves. Scar tissue forms in between. They don't heal across, as skin does.

Q. Having in mind the history that this lady

(Testimony of Dr. E. G. Chuinard.)

gave you, [73] Doctor, what, in your opinion, is this foreign substance, foreign body?

A. I think it is a piece of the bone, plus cartilage, knocked loose from the end of the femur, or it may just be the result of a hematoma, which has become absorbed except for the fibrous element and then, as calcium is deposited in it, you get what you call a calcified hematoma. I do not believe it can be determined from the outside certainly as to whether or not that is a calcified hematoma, or a piece of bone or cartilage that has been knocked loose.

Q. How did that condition come about normally, what caused it?

A. Calcification is a part of the healing process. For instance, we take X-rays of the lungs to see whether or not a latent tuberculosis has healed. One of the definite indications of calcium is the deposit itself in that region. Many people come in with a calcareous condition in their tissues. It is an indication that there has been some tearing of a muscle or injury or some kind or a pool of blood, but it has healed by calcification. That is a common occurrence in various diseases of the body.

Q. Is this condition, then, one that is incident to accident or trauma? A. Yes.

Mr. Powers: That calls for entire speculation, without [74] the history.

Q. (By Mr. Sims): You have the history before you?

A. I have the history here, yes.

(Testimony of Dr. E. G. Chuinard.)

Q. Go ahead and give us the history.

A. She told me she injured her right knee on the 15th of May, 1943, when she jumped in the act of working; that she landed on her feet and at that time most of the weight seemed to be on her right leg, and she experienced sudden pain, severe pain in her right knee.

When I questioned her as to this, she said, as far as she could remember, there was no direct contact of the knee with the ground or the floor or any object, and that she does not remember a severe twisting or sprain of the knee.

Q. Based upon the history that she gave you, and your X-rays, your X-ray studies, and your physical examination of this knee, what, in your opinion, is the cause of that condition?

A. Relying upon the patient's statement that she has had no other injury or accident and on the history of continuous trouble since that time, and putting the physical findings and the history and X-ray findings all together, it seems apparent that the patient has had a chronic disability in this knee resulting from this injury which she mentions.

Q. Based upon your years of experience and the type of work that you are now limiting your practice to, is this normal and is it the type of thing that would come from such a [75] history as this?

A. Yes, we see this happen frequently.

Q. Can this knee be treated by heat and massage or physiotherapy, so it will get healed?

(Testimony of Dr. E. G. Chuinard.)

A. No, those things will not cure the knee. They may help make the knee feel better at times.

Q. What is indicated, then, Doctor?

A. She should have surgery done for the purpose of removing this foreign body. It is the same as a person getting a piece of sand or some other object in their eye. It is a constant irritant to the synovia, to the knee lining, and should be removed.

Q. Do you feel what you felt was a foreign body, or was it a part of this fractured cartilage?

A. I think it is most apt to be a foreign body, because of the way she can move it and get it completely out of the region of the semilunar cartilage.

Q. Regardless of what it is, would you say it would require surgery? A. Yes.

Q. After surgery, would you say the knee would be normal and as good as it ever was?

A. No, it will not be. I do not believe this knee will ever be as good as it was before it was injured. That statement is based upon the fact that the patient has a roughening [76] of the articular cartilage. A knee that looks like this in X-rays, when operated upon, usually shows a definite roughening or what we call osteochondritis of the cartilage. That is roughening and fraying off. Another term used is traumatic arthritis, on the basis of trauma or injury.

Q. There has been some statement by counsel that this was arthritic. Did you find any evidence of that?

A. Well, the term "arthritic" usually is meant

(Testimony of Dr. E. G. Chuinard.)

to cover people who have an infectious arthritis. That is a type of arthritis that is rather widespread. This patient has not that kind of arthritis, I feel certain. I feel certain she has arthritis localized in one joint, as a result of trauma.

Q. What is trauma, Doctor?

A. That is injury, any injury.

Q. What would be the reasonable value of the services of a specialist such as yourself in removing the foreign body and fragment of cartilage, or whatever it is you found in there, to repair the knee? What would be the reasonable value of the services of an expert such as yourself?

A. Oh, depending on how extensive the work might have to be. May I ask, do you mean just the surgery or do you mean the treatment afterward?

Q. No, I mean the whole job.

A. The hospital and everything? [77]

Q. That is right.

A. I think with such after treatment it will run from four hundred to five hundred dollars.

Q. How long, about, would she have to be in the hospital?

A. That would vary a little bit, depending upon the length of the incision in order to get this foreign body out. Sometimes, they are available, just put in your fingers, but sometimes they are not quite so easy; it is quite a search to get them out. I don't believe her hospitalization would run over a couple of weeks.

Q. Say two weeks or fourteen days?

A. Yes.

(Testimony of Dr. E. G. Chuinard.)

Q. I assume, of course, it would only require one operation to remove both the foreign body and the damaged cartilage?

A. Yes. The cartilage could be inspected at the time and, if it is injured, as I believe it undoubtedly is, it should be taken out, because it will probably cause future damage or future trouble, if it is not.

Q. With this knee in the present condition, and prior to any surgery, is that naturally and normally common in the function of the knee that it locks the knee and makes it immobile so that the patient is likely to fall?

A. Yes, if the foreign body or cartilage, if loose and intruding itself between the articulating surfaces, it might impede the motion of the knee joint.

Q. If the operation went along smoothly—by that, I mean no infection or delay—would you say then it would still be permanently impaired?

A. Yes, I believe there will be some permanent disability, no matter what is done.

Q. If infection should set up in that knee, an infection that did not clear up, what then?

Mr. Powers: That is going quite far afield, I think, your Honor. It is speculative.

The Court: He has not said anything about infection.

Q. (By Mr. Sims): Ordinarily, Doctor, does infection always follow?

A. No, it does not, under modern surgical con-

(Testimony of Dr. E. G. Chuinard.)

ditions. I think one could almost forget about that.

Q. Very rare? A. Yes.

Q. You think it is so unlikely you could just forget about it? A. Yes.

Mr. Sims: I think that is all.

Cross Examination

By Mr. Powers:

Q. Doctor, just a few questions. I think your first X-rays were taken in 1944, some time. You have the exact date there. [79]

A. My first X-rays were made May 23, 1944, and again on October 28, 1944, and then these that were made yesterday.

Q. Yes, the ones that you brought with you today were taken two years after your last ones in 1944? A. That is right.

Q. Well, now, what can you tell the jury as to whether there has been any development of this arthritis in that two-year period? Can you see more now than you could two years ago?

A. No, I don't think so. There has been no increased roughening that I can tell by the X-rays.

Q. Ordinarily, if you have a traumatic arthritis, it continues to develop, does it not?

A. Well, not always, in a young person; if it is fairly superficial, that is, the cartilage has not been completely broken off so that the bone is entirely uncovered, then you usually do not get a continual—

Q. Arthritis is shown by the roughening of the bones, is that what it is? A. That is right.

(Testimony of Dr. E. G. Chuinard.)

Q. You have examined the X-rays taken on June 7th, I think it is marked, within three weeks after the accident. Will you state to the jury that, in your opinion, that roughening came as a result of an accident that occurred only two or three weeks before? [80]

A. Yes, it could.

Q. In your opinion, Doctor, did that come as a result of anything that occurred just a short time, two or three weeks, before?

A. It could have, yes.

Q. And your opinion is that it did, from the history given to you by the plaintiff?

A. Yes, and ruling out any other cause of it. I mean, I have to rely on the previous history. It fits into the history she gave, yes.

Q. What history did she give you about jumping, Doctor? You said no twisting, no sprain, that she knew of; she did not strike her knee against anything. What history was it that would indicate traumatic arthritis to you?

A. The arthritis itself—I think I perhaps see what you are getting at. The arthritis itself is not something that happened immediately. Arthritis is a chronic roughening of the joints. It is something that remains after the whole thing is over. You see in the X-ray the smooth contour of the surface of the bone. That still remains. That is why I say now that the patient has chronic traumatic arthritis of her knee joint.

Q. Arthritis, as such, is not something that just happens today. In your opinion, isn't it a fact that

(Testimony of Dr. E. G. Chuinard.)

you feel that arthritis developing there, and it had developed for some [81] little time before this accident, May 15, 1943?

A. Before the accident?

Q. Yes.

A. Oh, I don't believe so. I think that is the result of injury. Now, may I say why?

Q. Yes.

A. Because it involves only one condyle, on one side of the knee joint. If it were a disease process there, it would involve the whole knee joint, and you would expect both condyles, both sides of the knee joint, to be involved. It is not so here. It is on the one side. If this injury had been of more severity, probably it would have caused a fracture of one condyle or even both of them, but only one condyle was affected. May I refer to the X-ray again to make my point clear?

Say that you have a fracture. Then, you have to open it up and put a pin or pins or screws to push that back. This did not go that far. Those are quite common things, where you see a fracture of the knee joint involving only one condyle.

Q. It is not an uncommon thing to have a hypertrophic arthritis there? That would also be consistent with the plaintiff's condition?

A. That is right except for two things. One is that hypertrophic arthritis is a term that applies to arthritis that [82] occurs in older people. It is a degenerative process that takes place as the years go on. It is a getting-old process.

(Testimony of Dr. E. G. Chuinard.)

Q. It also comes in young people, does it not?

A. I think the classification of arthritis, as we find it among those who essay to classify it it places hypertrophic arthritis, or degenerative arthritis, as referring only to the older folks. The other point is—the other point of difference is that hypertrophic arthritis would involve the whole knee joint, on both sides. It would be general, not just a part of the joint.

Q. Is it not a fact that these little bodies develop as a result of hypertrophic arthritis?

A. They may come from several things——

Q. I asked that particular question: Is it not a fact that they do come from hypertrophic arthritis?

A. You are speaking in general, not this one case?

Q. Is that not a symptom of hypertrophic arthritis, to have some foreign body, bony substance, in the knee at times?

A. Yes, it is often found.

Q. It is very frequently found, is it not? Osteochondritis, don't that start by an impairment to the blood supply in the knee? What is the fact about that?

A. I think you are bringing up a point that was spoken of, osteochondritis dissecans. Yes, such a condition can occur, due to poor blood supply in any joint. [83]

Q. That quite frequently occurs in young people, does it not?

(Testimony of Dr. E. G. Chuinard.)

A. Not as frequently as in older people. It is usually an involvement of the whole joint. Many times that involves numerous joints in the body, too.

Q. Did you take an X-ray of the other knee to see what condition was there? To see what the condition was in the plaintiff's other knee?

A. No, I did not at any time.

Q. That would throw light on it, if it were a disease, would it not?

A. I don't believe it would in this case.

Q. If you found the same condition in the other knee of arthritis——

A. Of course, when the plaintiff came to me, it was the thought of finding out what to do—I didn't think it was probable. I don't believe that it has any bearing upon this case, or I would have taken it.

Q. Yes. Well, I will ask you again——

A. Yes.

Q. That is one check, is it not, where there is this roughening? There is arthritis in the knee now, is that not a fact? A. Yes.

Q. And if you found arthritis in the other knee, that would [84] be a check on it as to whether she—as to whether it might be disease or injury, is that not a fact?

A. It would be interesting, yes.

Q. How much of a jump did the plaintiff tell you she had made?

A. Well, I cannot answer that question now. I don't remember that she—she described this thing

(Testimony of Dr. E. G. Chuinard.)

to me at the time but I can't tell you how many feet she jumped.

Q. In the absence of knowing how far she jumped, is it not difficult for you to tell the jury that she landed with sufficient force that she would drive one bone against the other and break off a piece of bone?

A. Well, I presume that I did know at the time, but if I were to say definitely just how far a person jumped now, I cannot say because——

Q. The fact of the matter is, is it not, that she could not possibly hit that upper bone unless she jumped stiff-legged and landed stiff-kneed, isn't that a fact, and you so testified in the last trial?

A. These bones are always in contact, of course, but that would be a way to produce this injury which she had.

Q. If she did not jump stiff-legged and if she did not give you a history of jumping stiff-legged, she could not have struck these two bones together?

A. She showed me how she jumped, if that is what you mean, [85] but the distance I cannot verify.

Q. Did she show you how she jumped stiff-legged or stiff-kneed?

A. She told me she jumped off some object and down onto the——

Q. ——floor? A. ——floor.

Q. She did not tell you she landed on her knee, did she?

(Testimony of Dr. E. G. Chuinard.)

A. She told me explicitly she did not land on her knee.

Q. What would conduct that force up to the upper bone? The only way—at least as I get it out of your testimony—would be if she landed stiff-legged. If she has the knee bent, is there any contact?

Mr. Sims: That is an argumentative question. It is not fair to the witness.

The Court: Proceed.

A. The only thing—counsel would seem to think you can't injure it unless you fall directly on the knee or stiff-legged. For instance, I have a flexed knee. You can still have a bending in contact. I do not mean you have to have a complete 180 degrees extension in order to do it. In fact, what I said here was to me important, the important thing at the time, and that is I was trying to figure out what this patient's trouble was, the possibility of a cartilage injury or a foreign body. As I said, in fact, until the patient [86] came back this time, I had never personally demonstrated the floating around of this foreign body. It is a question whether it was attached yet or not. You are more apt to get a cartilage injury if the knee is twisted or strained.

Mr. Powers: Q. She did not give you any history of twisting or spraining?

A. She said she could not remember. She said

(Testimony of Dr. E. G. Chuinard.)

the pain was severe but she did not believe the knee had direct contact with the floor.

Q. I would like to confine my inquiry to this theory of yours that when she came down one bone got up so hard against the other that she knocked off this foreign body that is now seen in her knee-cap. My question is whether, in a flexed condition, like you demonstrated, there is any blow or any force against this femur that could possibly break off this body?

A. Yes, there is. It is much more than the femur against the tibia in that position (illustrating). In this position (illustrating) my weight does not act to transmit it to the ground but it is there, just the same. That seems perfectly clear to me.

Q. I was going into your own statement to the jury that it could be one of two things. One thing was that, in jumping, it had come up and knocked a piece, a bony portion, off the femur. [87]

A. Yes.

Q. And, in that connection, my question was, whether or not in your opinion that knee—if the knee was flexed that could happen and, if so, how much of a jump you would have to make.

A. Maybe I have not made that clear. Ruling out any other injury, relying on the patient's history——

Q. No, on your theory here. You do not have much of a history of how far she jumped.

A. I don't think she jumped very far. These so-called baseball injuries—the cartilages——

(Testimony of Dr. E. G. Chuinard.)

Q. No, not the cartilage. I am talking about the bone here.

A. I beg your pardon. That is right, but I think we are both trying to get this thing clear.

Q. That is right.

A. I am trying to answer your question correctly.

Q. To break a piece of that femur—that is the sleeve bone in the upper part of your leg?

A. Yes.

Q. To break a piece of bone off the femur from jumping, wouldn't that take quite a jump?

A. It would take quite a little blow, too.

Q. If your knees were flexed?

A. Oh, yes, it can do that. [88]

Q. Is there any force against that femur that could possibly do that, in a flexed position?

A. Yes. That is done every time—every time you jump off something, you come down with a springing motion. Nobody ever jumps on their heels. All you have got to do is to do that just once. We don't all jump the way we expect to. People do get broken bones when they jump—hitting something that is not level, a twisting force, a direct force. If you come down in such a way so that you get the two condyles being driven against the impact, instead of getting a good even motion——

Q. Can these two condyles come together without twisting?

A. Yes. They do all the time.

Q. A cartilage separates them, doesn't it?

(Testimony of Dr. E. G. Chuinard.)

A. Well, the cartilage is in contact of course. The cartilage itself is not big, the cartilage that covers the bone.

Q. The semilunar cartilage in there?

A. Yes. These condyles are sort of rounded on the ends.

Q. Did you find the movement of the knee normal at this time, outside of this foreign body?

A. Now, you are referring to the first time?

Q. The first time you saw the plaintiff and the present time.

A. Yesterday, no restriction in range of motion; the knee joint was stable; no appreciable atrophy of the thigh, the [89] two thighs.

Q. Will you explain that a little bit to the jury? What significance does that have, that there was no atrophy in the thigh or the leg?

A. It means that she is using it; it means that she is depending upon that knee joint, using it to such a degree that the muscles are being used and are strong.

Q. In other words, she does not show that she has been sparing it?

A. It would not indicate it from an examination, no, sir.

Q. You mentioned that this foreign body was superficially in place. I take it that is not deeply imbedded?

A. That is right. There are areas there around the knee joint where there isn't much tissue between the bone and the skin and not covered by much

(Testimony of Dr. E. G. Chuinard.)

muscle, and you can easily feel it. In fact, I did yesterday.

Q. That being the case, would that not simplify the removal of this?

A. It would, but I think the proper thing in this case is to make an incision extensive enough—it would not have to be too much—to inspect the knee joint, and inspect this semilunar cartilage, to see whether other things should come out, other possibilities of causing future trouble.

Q. Assuming that this foreign body is all there is to it, you could take that out without much of an operation? [90]

A. Depending if you cut it superficially——

Q. That is what I mean. You can see it, I take it. It would not be hard to reach, then?

A. No, in such circumstances as that, that would be thoroughly easy.

Q. It has been in that relative position for a period of over two years, hasn't it?

A. No, that is the first time I ever felt it. As to whether or not she felt it, she could tell you better than I. From the X-rays, it has always been located in the same position. That is what has led me to believe before that it was attached rather than loose.

Q. Can you say now whether it is or is not attached?

A. I think it is loose. We felt it definitely about the lateral side of the knee joint.

Q. Probably imbedded in fatty tissue?

(Testimony of Dr. E. G. Chuinard.)

A. Not imbedded enough to make it too attached, anyhow. I can't say whether this foreign body is what makes her knee lock or whether it is the cartilage.

Q. When did you take this history you are referring now? Was that in 1944?

A. Yes. Then, I made another history yesterday.

Q. Does she still claim it locks?

A. Yes, catches at times.

Q. It is something different than locking, is it not? [91]

A. That is right.

Q. Did she give you a history of having worked fairly steadily for the last year and a half?

A. No, she has not worked steadily, but she has been working. She has been interested in working as a dishwasher. She has tried to get the work that she had done before, but it put too much of a strain on her knee.

Q. You have no way of knowing whether this foreign body is the one that has caused the plaintiff's knee to catch, is that right?

A. I can say for certain that it is, but there may be some damage to the cartilage that is doing that, the semilunar cartilage.

Q. You have no way of knowing whether the cartilage is damaged or not?

A. Except as I have already mentioned, by the X-ray findings. It is almost impossible that you could get a crushing of the femur and tibia and not get something that would show in the X-rays, with-

(Testimony of Dr. E. G. Chuinard.)

out any crushing of the intervening substance, being the semilunar cartilage.

Q. That, Doctor, assumes that it came from accident, doesn't it, from trauma, we will put it? Assuming that it came from disease, the part just sloughed off? These things are just sloughing off?

A. What do you mean by "sloughing off?" [92]

Q. In explaining what this dissecans was—is that not a sloughing off?

A. Did I bring up the term "osteochondritis dissecans" before?

Q. You were asked about it.

A. Yes, and didn't I say that in my opinion I did not favor using the term "osteochondritis dissecans," because the ending "itis," in the most acceptable terminology, refers to infection like appendicitis and so on. The ending "itis" is not a good term for this. It should be "osteochondrosis," which means full; in other words, full of little foreign bodies. I do not believe that this is a disease process. I think it is due to injury. Whether it is due entirely to that, I cannot testify to that. It may be.

Q. And it could be due to disease, could it not?

A. Well, I don't believe so. That localized region in the bone, in the knee bone, I don't believe is due to disease.

Q. Although you do find foreign bodies very frequently in the knee joint? They call them "joint mice?"

A. That is right.

(Testimony of Dr. E. G. Chuinard.)

Q. That is, without any accident at all?

A. That is right.

Q. Here, if it developed the plaintiff had had trouble with her knee prior to that time, that would be consistent with a diseased condition, would it not? [93]

A. I would say this: I would rather believe this patient had had a previous injury which caused this trouble than that she had had any diseased condition which caused it. I can't say that these findings in her X-rays or her symptoms are due to this accident that she is claiming. I have no way of saying that. However, everything is compatible with that, but the appearance of the X-rays indicates to me definitely that at some time she had a trauma which caused her trouble, rather than a diseased process.

Q. When you say that you probably hear about these things every day, according to the history she gave you, it is an unusual thing for you to find broken pieces of bone from the femur, is it not, from a trifling accident like that?

A. It is not as usual as some things, but it is not unusual altogether. Let me reiterate a point I made. I don't know that this came from the end of the femur. It might have been just a calcified hematoma.

Q. A calcified hematoma of that size would be a very rare thing, would it not? A. No.

Q. In a knee bone? A. No.

Q. Is that fibrin you talk about coagulin fibrin?

(Testimony of Dr. E. G. Chuinard.)

A. Fibrin. Fibrin, of course, is a part of the blood. You just take blood and put a stick into it and you get [94] fibrin on the end of it. As part of the blood absorbs in the knee joint or any other place, it leaves fibrin and that often forms a thick scar tissue, and calcium is deposited in it and then you get your so-called calcified hematomas.

Q. There is no calcified cartilage here. If there were, you would see that in the X-ray, the cartilage itself?

A. Sometimes we see calcification in the semilunar cartilage. That is not shown.

Q. That is not in evidence here?

A. That is right.

Q. Is it not a fact that the coagulation of this fibrin is mentioned as something like mellow seed or a rice body? You do not find these larger foreign bodies you are talking about as a result of any blood or fibrin coagulation?

A. This so-called joint-mouse don't necessarily have anything to do with the hematoma, calcified hematoma. The so-called rice bodies are usually a term that is applied to tuberculosis; when we have tuberculosis in a joint you will have little rice bodies, but those are somewhat different in appearance from the others.

Q. As I understand your testimony, you thought some of the fluid in the blood was absorbed and the rest of it developed into this fibrin? All I am asking is this: Outside of tuberculosis, regarding this coagulation of the fibrin, or whatever the term is,

(Testimony of Dr. E. G. Chuinard.)

medical authorities nearly [95] all recognize it is a small body, known as a melon seed or rice body, rather than one of these pieces of bone.

A. I don't follow that.

Q. Are you familiar with Dr. John Lewis, Professor Emeritus of Johns Hopkins Medical School?

A. Well, I knew who he was.

Q. In 1944, he published a work.

A. Did he write that himself?

Q. I think he did.

A. Or was it just a collection of things that he has gathered?

Q. You are familiar with his work?

A. Is he just an editor?

Q. This is his book. He is the editor of this.

A. Or did he get someone else to write a series of articles? He is not an orthopedist.

Q. Do you disagree with that?

A. No, I just don't see where it pertains to the knee at all. We could just spend a lot of time on irrelevant things that you can maybe think of.

Q. Aren't they formed as a result of a degenerative process, these little bodies?

A. Yes, they often are. In osteonecrosis, little pieces of bone break off in the knee joint or whatever joint is involved. [96]

Q. Then, the removal of such a body, because of the necrotic condition, is of secondary importance?

A. The removal of such bodies? That is of secondary importance?

Q. Yes.

(Testimony of Dr. E. G. Chuinard.)

A. No, that is not true. This is a pretty good-sized piece in there, and you can imagine it rolling around inside the knee joint. It is just comparable to having a piece of sand or a grain of wheat in your eye.

Q. You attended Oregon Medical School, I think you said? A. Yes.

Q. Dr. Charles McClure was one of your chief instructors? A. Yes.

Q. In orthopedic matters?

A. That is right.

Mr. Powers: That is all.

Redirect Examination

By Mr. Sims:

Q. You started to say something about baseball injuries and you were interrupted. I am interested in that. Baseball pitchers chip fragments of bone just by pitching the ball——

Mr. Powers: I think that is too remote in this case.

Mr. Sims: You asked about it in this case and I want to know about it.

The Court: Answer. [97]

A. They are not so apt to pull a piece of bone loose. A typical example of the point is an instance in which the ankle is bent inward or outward, one or the other, and the end of the bone is pulled off, and the ligaments pull it back. The bone gives rather than the ligaments.

The thing of interest about the knee is that I

(Testimony of Dr. E. G. Chuinard.)

wanted to know whether or not the patient had a sprain or strain in the knee, rather than some sort of a direct contact. This patient did not experience this strain or sprain. It was just that she jumped down on this knee and felt pain in her knee.

Q. (By Mr. Sims): Would jumping down from a level of 33 or 34 or 35 inches on the part of a lady thirty-eight years old, weighing 165 pounds, do the damage that you have described?

A. I believe it would.

Q. As to this arthritis, do you feel the X-rays, if this is a diseased condition, if there wasn't an accident, do you believe that X-rays of the other knee would show the same effect or condition?

A. I don't believe it would. Of course, this term "arthritis" is bandied about so much, and we have to know what we mean by it. We see people coming in, fifty or sixty years of age, that have been in an automobile accident, and you take X-rays for something else and you find their bones are [98] exceedingly rough. The X-rays locate the trouble. The arthritis is there, but it means nothing in the case.

I think such a disease as arthritis, as we think of infectious arthritis, is not a part of this picture in this case. I think it is traumatic arthritis, from some trauma of some kind.

Q. From the X-rays and from the case history, what do you feel the probabilities are as to when that occurred?

The Court: That is all covered.

Mr. Sims: It has been covered, yes.

(Testimony of Dr. E. G. Chuinard.)

Q. Are there any other ligaments in this knee that would be torn beyond repair?

A. No. Even when I examined her the first time, I made note that the ligaments inside the knee joint and outside were intact?

Q. So that the injury is limited to this foreign body and to such cartilage as might have been fractured at that time?

A. Yes, that is right.

Q. And the foreign body, as I understand, it is your best opinion it might be a small fragment from the femur or it would be such a calcified blood mass that would fall off or be pulled off?

A. That is right.

Q. There is evidence in this case that, following the accident on May 15th, the knee puffed up and was swollen. Does [99] that indicate blood on the knee?

A. Absolutely, that is what swelling of the knee is. We will have cases come to the hospital like that, with intense pain, where there is no fracture in the knee-cap. Any acute sudden swelling with pain is due to a collection of blood in the joint.

Q. We have the benefit of the testimony of Dr. Woerner, who examined the knee shortly after, a day or two I think after this happened, and he said that there was swelling. You may not have heard this before.

Having that in mind now, and that is the evidence in this case——

Mr. Powers: Moderate swelling.

(Testimony of Dr. E. G. Chuinard.)

Q. (By Mr. Sims): Moderate swelling in this knee. Having that in mind, as well as the other matters that you have referred to, would you say the probabilities are that there was a blood mass that became calcified?

A. I think it would be more likely to have been a calcified hematoma.

Q. Doctor, does this foreign body show more clearly and more distinctly in the later X-rays than in the films taken at Bend just a few weeks after the accident?

A. I think the bone calcification in it appears denser.

Q. Would that indicate that it was either a bloody mass or was a chip of bone? [100]

A. I don't think you can say.

Q. That would not matter?

A. I don't believe so.

Q. With the best possible result in surgery, would that be as good as——

Mr. Powers: We have been over that three times.

The Court: Sustained.

Mr. Sims: That is all.

Recross-Examination

By Mr. Powers:

Q. These hypothetical matters, where they pulled off a bone, would take some stretching of ligaments, would it not?

A. A ligament does not stretch. A ligament bends and it does give, but does not stretch.

(Testimony of Dr. E. G. Chuinard.)

Q. Are the ligaments intact? A. Yes.

Q. Nothing wrong with them? A. No.

Q. The whole range of motion on both sides of the knee?

A. The same results from that standpoint?

Mr. Powers: That is all.

Redirect Examination

By Mr. Sims:

Q. Then, as I understand it, if a piece of bone was pulled off, it would be because the ligament was giving and the bone—— [101]

A. Well, here, you see, instead of having a sort of evolution of the mechanism, pulling apart of something, you had a crushing against something, simply due to attrition.

Q. Is that a painful sort of experience?

A. Yes.

Mr. Powers: That is not the experience in this case.

Q. (By Mr. Sims): In this particular case, would she have pain immediately following this jump? A. Well, I should certainly think so.

Q. Referring to the matter of surgery, is that painful, too?

A. Of course, during the surgery she has an anesthetic for that, but afterwards they do have pain for two or three days, quite a bit, which, of course, would be controlled. That is all we can do.

Q. For how many days following such a surgery would she have extensive pain?

(Testimony of Dr. E. G. Chuinard.)

A. Well, she would not have extensive pain but a few weeks.

Q. It would diminish soon after the operation?

A. That is right.

Mr. Sims: I think that is all.

Recross-Examination

By Mr. Powers:

Q. Is it likely a person would have such a severe blow as [102] to break off a piece of bone and, after getting first aid, after an hour or two would go back and work the rest of the night, and keep on working the rest of the night?

A. Well, it depends somewhat on the person, of course. Yes, that is possible. We see people working, that keep working with fractures, and come along. If the weight-bearing part of the bone is such that the bone does not give way, then, it is possible. Football players finish the game.

Q. I am not talking about football players, but a woman who went to work and worked the rest of the night.

A. Somebody who had a great amount of determination would do it; depends on the amount of pain and such factors.

Mr. Powers: I guess that is all.

(Witness excused.)

The Court: We will adjourn until 10:00 o'clock tomorrow morning, Ladies and Gentlemen.

(Adjournment.) [103]

Court reconvened at 10:00 o'clock a.m., Wednesday, December 4, 1946.

BETH NORTON,

a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and was further examined and testified as follows:

Direct Examination

(Continued)

By Mr. Sims:

Q. Mrs. Norton, through the courtesy of the Court, you were withdrawn so that Dr. Chuinard could testify? A. Yes.

Q. We had not finished with your examination. I asked the Court Reporter the last question, and I think it was in reference to the condition of the mill now, the box factory part of the mill, as compared to the way it was when Galina Smith was hurt. You testified, I believe, that you could walk in on the same level. That was the last answer.

To go on from there, how is it that this material that goes to make up the boxes, in other words, the boards—before it was carried away on these rolls, which you say are taken away.

A. Carried away on a belt.

Q. Carried away on a belt? A. Yes.

Q. And the belt is where? [104]

A. Underneath the steel table.

Q. I am handing you, through the courtesy of the Bailiff, Plaintiff's Exhibit No. 27. I will ask

(Testimony of Beth Norton.)

you if you can indicate on that picture whereabouts that belt is.

Mr. Powers: There is no claim that there is anything wrong with it. I don't see the materiality of that.

Mr. Sims: It is material in this respect, your Honor, that they deny liability, they deny that that change could be made or was practicable. I think we are put on notice. We have to prove that they are carrying away the material just as fast and just as efficiently with the change made, and that it makes it possible now for punks to get in without jumping. That is the purpose of this examination.

Mr. Powers: What they claim is that we should have had some steps to get down into space and out. That is the only allegation of negligence that they have in there. There is nothing claimed about machinery at all, so we submit it is not material to the issues here.

Mr. Sims: We claim that it was practicable for them to make the change.

The Court: What change? He says you are only claiming about the steps.

Mr. Sims: I would have to have the pre-trial order before me.

The Court: Find out and know what you are talking [105] about.

Mr. Conway: Page 3, Paragraph V of the complaint, sub-paragraph 3, reads: "By designing mounting structure of the said high cutoff saw so that an entrance at pit floor level was provided for

(Testimony of Beth Norton.)

entering said pit, as was done for some of the other high cutoff saws."

The Court: What does that mean?

Mr. Conway: There are two other paragraphs, subparagraphs there and, as I say, No. 3 reads, "By designing mounting structure of the said high cutoff saw, so that an entrance at pit floor level was provided for entering said pit, as was done for some of the other high cutoff saws."

The Court: What does that No. 3 mean?

Mr. Conway: As I understand the situation, your Honor, it would include the situation that existed at the mill in connection with removing the rolls, which were along one side of the pit at the time Galina Smith was working there, and, after the rolls were removed, we have shown in the other trial, that they got the same amount of material through the saws, and so forth, and that the workers, the punks, could walk in on the floor level instead of jumping down. It was also referred to in the opinion of the Court.

The Court: What do you claim happened? What changes were made? Tell me what changes were made.

Mr. Sims: The rolls were actually removed and a belt [106] was installed under the table so the material is being hauled away just as efficiently by the use of the belt as it had been by the rolls.

The Court: How did they get in afterwards?

Mr. Sims: Walk right in on the floor level.

The Court: From where?

(Testimony of Beth Norton.)

Mr. Sims: From the street entrance, the rest rooms—the exhibits are in evidence, of course, the pictures.

The Court: I had not understood that.

Mr. Powers: There is no controversy about that, your Honor.

The Court: Walk straight in?

Mr. Powers: Walk straight in.

The Court: He says that was a part of the hazard as it existed, that she could not walk straight in there.

Mr. Powers: But he does not have it in his complaint, as such, your Honor.

The Court: That is his point No. 3.

Mr. Powers: What his point No. 3 actually has been, up to this time, is that these saws are up above and the material slides down and the working area for the worker there—the material comes down on a table like this (illustrating) and it is necessary for the worker to be up against the table. In other words, there is no way of having a stairway there.

The Court: You were not in the other trial?

Mr. Powers: This is from the record, your Honor.

The Court: Go ahead.

Q. (By Mr. Sims): Does that picture show the belt that you are talking about? I think I have already referred to the number on the bank. I want to identify it for the record. That is No. 27, is it not?

A. Yes, it is.

(Testimony of Beth Norton.)

Q. Can you point from where you are sitting and show us the belt?

A. Right along here (indicating) under that steel table.

Q. Does that conveyor belt show any of the material there?

A. Yes, here is one little bundle going down right here (indicating).

Q. Will you step down and indicate to the jury how that it?

A. (Indicating) Here is a bundle right here.

Q. By "bundle", what do you mean?

A. Well, you pile your lumber as it comes away from the cutoff saw, pick up a little at a time and put it on the belt.

Q. Have you actually observed this thing in operation? A. Yes.

Q. I suppose many times?

A. Many times.

Q. Does it take away the material as fast and as efficiently, [108] according to your observation, as the rolls?

A. Oh, yes. I don't see any difference.

Q. In other words, in your opinion, it is not slow and cumbersome? A. Oh, no.

Q. Moves along and takes the things away?

A. Yes.

Q. The same amount of material comes down from the saw? A. Yes.

Q. The same sawyers are working?

A. Yes.

(Testimony of Beth Norton.)

Q. So that now, as I understand it, you walk in to all of these pits just—well, to use a rather crude expression—just like stock coming in and out of a barn; it is just all level and there are stalls. It is the same situation? A. Yes.

Mr. Sims: So that the record will be entirely clear—I think perhaps there is a little confusion—we want all of the exhibits offered by the plaintiff.

The Court: You will have to wait until the Clerk gets back.

Mr. Powers: We will stipulate that the exhibits——

The Court: Wait until he gets here.

Mr. Sims: Your Honor, the stipulation Mr. Powers and I have made is that all of plaintiff's exhibits that were [109] offered at the other trial may be offered and introduced without objection and that, following your Honor's suggestion of yesterday, we will use the same identical numbers. That applies to the plaintiff's exhibits that were actually introduced in the former trial, unless counsel, of course, wants the pre-trial exhibits also. Is that correct?

Mr. Powers: That is correct.

Mr. Conway: These exhibits I have in my hand are the ones we went over this morning, Mr. Powers.

The Court: All right. Give them to the Clerk.

Mr. Sims: You may cross examine.

(Report of physical examination of Galina M. Smith dated 9/12/1942 and signed J. F.

(Testimony of Beth Norton.)

Hosch, an Examining Surgeon, thereupon received in evidence and marked Plaintiff's Exhibit No. 11.)

(Statement of Income Tax for Calendar Year 1943 paid to Galina M. Smith, Bend, Oregon, thereupon received in evidence and marked Plaintiff's Exhibit No. 12.)

("Shevlin-Hixon Company memo of final wage payment, period from 8-16 to 8-31", thereupon received in evidence and marked Plaintiff's Exhibit No. 14.)

(Three photographs thereupon received in evidence and marked Plaintiff's Exhibits No. 26, No. 27 and No. 28, respectively.)

(Statement of Galina Smith, October 26, 1942, to August 24, 1943, Record of time and earnings while employed, thereupon received in evidence and marked Plaintiff's Exhibit No. 30.)

Cross Examination

By Mr. Powers:

Q. I believe you worked in the daytime?

A. Yes.

Q. You were never there to work at nights while Mrs. Smith was working? A. No.

Q. What went on at night, you would not know anything about that, would you?

A. Would not be too different from the day.

Q. You just do not have any actual knowledge of what occurred at night? A. Oh, no.

(Testimony of Beth Norton.)

Q. I believe you stated you had occasion to crawl over the table here on numerous occasions, is that right? You came down the catwalk, walked down the steps, crawled over the table and then jumped in on the floor?

A. Walked from the table; don't have to get down on your [111] knees before coming to the edge of the table. You just jump over the bar over the saw and step on the table and jump from there to the floor.

Q. What kind of crawling did you have in mind when you testified?

A. Well, I perhaps should not have said that. I didn't mean it the way it sounds, I guess.

Q. You testified at the last trial you crawled, too, did you not?

A. Well, you crawl over the bar is probably what I was trying to say.

Q. I will ask you whether you did not testify at the last trial, reading from the transcript: "How would a punk get in and out of 4 and 5 in May of 1943?" Answer: "She would walk down the catwalk and crawl over the edge of the steel table and jump from there."

Mr. Conway: To the floor.

Mr. Powers: Jump from there to the floor.

Mr. Sims: That is what she is saying now, isn't it?

Mr. Powers: Just a moment, please.

Q. I think you said now you crawl over some bar, rather than the edge of the table?

(Testimony of Beth Norton.)

A. I don't know how to put it to make you understand what I mean. I don't know what to call the parts of the machinery. They are part of the whole thing, but we have to crawl over [112] this part to get your feet onto the steel table.

Q. The steel table is about what size?

A. Oh, I don't know. I don't hardly know how to say that, either.

Q. Is it a wooden table with an iron or steel top? A. Yes.

Q. Would you say it was something about three feet wide and a little longer?

A. Well, yes, the flat part is, but if you were giving the dimensions where your lumber slides, it has a kind of a sloped side to it and then there is this little square flat space where the lumber comes down.

Q. That is the part I am speaking of, the level space. Is that about three by four?

A. That is pretty close, yes.

Q. In that particular area there is no saw, is there, right on this table, where that steel top is?

A. Where the steel top slopes up?

Q. No, the flat part?

A. No. Your saw is above that.

Q. And that is about a three or four-foot area there? A. Yes.

Q. There is no saw on that; there is nothing on that, is there, on that flat area?

A. Nothing on the flat area, only just a place to kick [113] your scraps through.

(Testimony of Beth Norton.)

Q. When you say you crawl over the edge of the steel table and jump from there to the floor, will you explain to the jury just how that operation would be?

A. Well, from this flat place, your table, your steel table extends up at a slant, and that is what you crawl over to get on the flat place before you jump. I don't know just how to explain it other than that.

Q. You mean, you stand up on both feet on this table and jump off? A. Yes.

Q. Pardon? A. Yes.

Q. How do you get over the table while coming out again?

A. Your table is only three feet or such a matter. You crawl up onto the flat place and then crawl over the top of the table.

Q. The table actually is about the height of a stool at a fountain, isn't it; about the same height as a stool that everybody sits on at a fountain or at a counter? Isn't it about thirty-three inches?

A. No, I would say it was thirty-six.

Q. Pardon?

A. I would say it was thirty-six.

Q. In that area? [114] A. Yes.

Q. It would still be higher than the table in front of me, would it not?

A. I would say it was, yes. I can almost tell——

Q. Could you tell if you sat by the table?

A. Pretty close to where it strikes; you can almost tell.

(Testimony of Beth Norton.)

Q. Would you mind showing the jury from this table, if the Court does not mind, about where the table struck you, and we will see how much higher it is than this table.

Mr. Sims: You can measure it.

A. This table is lower than the steeltable.

Q. (By Mr. Powers): About where would it strike you?

A. About here (indicating).

Q. If you want to, hold your hand there and I can measure. Mr. Sims suggested that I can measure it and see.

Mr. Sims: The bottom of her hand is about six inches above the table top.

Q. (By Mr. Powers): It is six inches higher than the table. All right, take the stand, please.

Mr. Sims: Do you want that measurement?

Mr. Powers: We have the actual measurement, Mr. Sims.

Mr. Sims: Two feet seven inches to the top of this table, if you want it.

Q. (By Mr. Powers): Mr. Sims says the table measures thirty-one inches. Is that what you said?

Mr. Sims: Yes. I think that is accurate.

Mr. Powers: That is all right. I am not going to stop now. If that is the case, it is six inches or more. You would have it thirty-eight inches high.

Mr. Conway: Thirty-seven.

A. Right now, I am wearing high heels, two-

(Testimony of Beth Norton.)

inch heels, two and a quarter perhaps, and when I work I wear low flat heels. That would make a little difference.

Q. (By Mr. Powers): It would drop down two or three inches, then? A. Yes.

Q. It would not be far off from thirty-three, would you say?

A. I still say it is thirty-six.

Q. It would not be far off from thirty-six inches, then?

A. All right. It would not be.

Q. In getting out there, would you boost yourself up backwards, like some people might do (illustrating)? How would you get out of there?

A. As many times as I have got out of there, I still don't know. I imagine I would just crawl up.

Q. You stated yesterday you went in the way that just came naturally; I mean, the natural way to get in, did you not? A. Yes.

Q. Isn't it a fact that the natural way of going in was to [116] get on the edge of the table and slide in?

A. No. I never at any time ever entered that way.

Q. You never entered that way? A. No.

Q. Did you ever enter by supporting yourself on the table at all and going down?

A. I suppose I have at some time or another. You can always reach out and grab the steel bar that is there as you jump, but I don't know that I did that.

(Testimony of Beth Norton.)

Q. There is a steel bar you can take hold of?

A. There is one that runs up where they set the stops for the lengths of the lumber cutting. You could take hold of that.

Q. It is something that is not turning?

A. No, it is not stationary. It turns——

Q. Would you grab it when it was turning?

A. It is possible to grab it, but I wouldn't say that I did. I don't remember that.

Q. The saw itself, you could not reach from where you were working? A. No.

Q. That is all protected and covered is it not?

A. The saw is not covered when it comes out, I mean to cut the boards off, but it is back and forth.

Q. It is beyond the reach of anybody working there? [117] A. It is above the reach.

Q. Getting in the space, as comes naturally, did you ever use your hand on the table this way (illustrating) to help yourself down or anything? Or did you, as you told the jury, get up there and jump off?

A. I don't remember using my hands on the table, no.

Q. If you were going to do it, what way would come natural for you to do it?

A. I would just jump. That is all I can say, just jump off the table.

Q. Without using your hands or sliding yourself down?

A. I would not slide myself in, not for thirty-

(Testimony of Beth Norton.)

six inches. That is not too awfully far to jump.

Mr. Powers: I believe that is all.

Redirect Examination

By Mr. Sims:

Q. I know you haven't been well, but there is one other question I would like to ask. Mr. Powers has asked you if the saw is above the line of your hands as you work there. Suppose material is accumulated there, short lengths or perhaps pieces of boards, would those pieces of wood or refuse be within reach of your hands?

A. I don't understand what you mean.

Q. What I am getting at is whether—you can refer to those pictures if you want to to refresh your memory. [118] What I am getting at is whether, as the sawyer works, if some defective boards come out and there was a long sliver in a board, that hung out there, would that piece of board be within reach of your hands? Would it be there on this slanting steel table?

A. Well, if it would happen to catch in the saw and was long enough, you could reach up all right.

Q. About how far above your hand is that saw?

A. Oh, I would say possibly two feet.

Q. A couple of feet above your hand?

A. Yes.

Mr. Sims: Thank you. That is all.

Recross Examination

By Mr. Powers:

Q. When you go to a table to work, there hasn't

(Testimony of Beth Norton.)

been any sawing done up to that time, the time that you go in there, and the place is cleaned up when you go in there? I mean, the average person does not go in—I don't know about you as a relief worker, but at the start of the entire operation, when the crew goes in and works.

A. In her case at night, where they move like that, I think it would be.

Mr. Powers: That is all.

Redirect Examination

By Mr. Sims: [119]

Q. In other words, in the daytime operation, the daytime operation is different; in fact, there is more lumber being brought up to the sawyers, is that correct? A. That is right.

Q. While at night, the sawyer just works up the material that has been stacked there?

A. That is right.

Q. On the night shift, presumably, this table that she jumps from would be clean of shook, but during the daytime that would not be the case?

Mr. Powers: What happened in the daytime, your Honor, would not be material.

Mr. Sims: You went into it. I don't know why.

Mr. Powers: I asked her because you were bringing out something there about the place being so filled with debris.

Mr. Sims: That is all.

(Witness excused.) [120]

ANNA BELLE McGRADY WUTHRICH

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. Are you the one they call Belle McGrady?

A. Call what?

Q. Belle McGrady, Anna Belle McGrady?

A. I used to be Anna Belle McGrady.

Q. But you got married and your name now is Anna Belle Wuthrich?

A. Wuthrich.

Q. You live at Bend?

A. Yes, sir, I do.

Q. About how long have you lived at Bend?

A. Well, since July, 1936.

Q. Were you ever employed at the Shevlin-Hixon mill?

A. Yes, sir, I was.

Q. In what part of the operation?

A. Well, I was all over the place. I worked on all machinery.

Q. What machinery was there?

A. Well, there was ten high cutoff saws, probably nine at first. I think we had one cutoff saw that was a small one that set out by itself. We used it as a scrap saw. [121]

Q. By "scrap saw" you mean what? What would you cut with it?

A. Small things, you know, pieces that are not O.K. lumber, and we have to cut them into smaller things, and some of them had been ripped, and some of them had not; in other words, it was a scrap saw.

(Testimony of Anna Belle McGrady Wuthrich.)

Q. What other power-driven machinery was there?

A. Well, I guess all of it was power-driven. I don't know of anything else, only power-driven machinery.

Q. How about the rolls? Mr. Powers told the jury that the rolls were not power-driven.

A. The rolls were a combination of power and gravity. When I went to work there in 1942, the rolls came across in front of the cutoff. The high cutoffs were up here, in other words, and her working place was down here (illustrating), I would say five or five and a half feet from the floor to her sawyer, to her operator. He was up here (illustrating) and the rolls came across from each end and in the center here (indicating), or about the center, they were rounded out and they ran—like you bring them down into the middle of this court room. It didn't interfere in our working with them. But they were gravity after that in here, and came in a circle, and when they put the lumber on there—they were power-driven with an endless belt under them. Here (illustrating) they were slightly tilted, enough to give them a gravity force, and the lumber would be coming down—it would just shoot right down there.

Q. As these rolls came together and made this turn, were those rolls far enough apart that you could walk between the two?

A. No, they came together. These high cutoffs were already built here (indicating); the stands

(Testimony of Anna Belle McGrady Wuthrich.)

that held the rolls were built to the cutoff or to this place where the saws was installed, and when they came together, they came together around, well, I would say—well, we will say Number 4 and Number 5. Number 4, they could put their lumber on here and it went that way (illustrating); Number 5 would put their lumber on there and it would go that way (illustrating). I never seen any go down between those two places.

Q. Were those rolls behind the girl working in Number 4 or Number 5 power-driven?

A. Yes.

Q. Did you work in Number 4 and 5?

A. I worked in everyone of them.

Q. You worked in all of them? A. Yes.

Q. What do you call your job?

A. Well, we call it helping or punking, punking the cutoff.

Q. How did you get into this pit?

A. Well, we went up and walked on the catwalk, as we called [123] it, up a flight of stairs and walked out to whatever particular saw we was working on. Then, we went down, I believe, three steps, facing the pile of lumber that the sawyer was working on, then we stepped over this—well, I will call it a box here, under the saw—

Q. Yes.

A. —which was about five feet this way (illustrating). We stepped over that onto the working table, then we went down into the pit.

(Testimony of Anna Belle McGrady Wuthrich.)

Q. The Bailiff has handed you the pictures, No. 27, No. 28 and No. 29.

A. These are numbered on the back.

Q. Referring first to the one that shows the steps that come up from the ground floor to this extended catwalk, extended sidewalk or catwalk or whatever it is——

A. Yes.

Q. About how many steps?

A. Here is nine and then another step onto the catwalk would make ten.

Q. Then, when you went down the other side, on the sawyer's side, how many were there there?

A. Well, must have been four, but I didn't only use three because I didn't go clear down to the bottom. I would step over and get into my working place. I will say there was three to where you step over into the working place.

Q. What did you step over when you got onto this table? What would you step over?

A. From the step to the table?

Q. That is right.

A. Well, that was a partition built here (indicating) which goes clear out to the timbers, I believe, that hold the catwalk.

Q. Was there a bar that the sawyer used as he worked, so that, if he was going to cut twelve-inch, for instance, he could slide this bar up to the proper place to cut twelve-inch?

A. There was a bar on the sawyer's left.

Q. Yes.

A. It was here, running this way (illustrating),

(Testimony of Anna Belle McGrady Wuthrich.)

power-driven, and it was going round and round and revolving, also.

Q. It was going all the time? A. Yes.

Q. It was going all the time after he started it?

A. Until he would shut it off to do something.

Q. And would you step over this bar used to measure the length of the lumber?

A. That depends on which side I went into the saw on. There were steps on either side. We could go up either side. I have went over the bar, but it was a little difficult [125] to go over there.

Q. After you got down, then, on this table, how would you go on down into this pit or whatever you call it?

A. I would kind of sit down on my feet and jump down.

Q. Kind of frog-like, you mean? A. Yes.

Q. And then jump? A. Yes.

Q. How would you get out of this pit then?

A. Well, there is botches or places to stack lumber, your different cuts and different grades, and I put my foot in there, especially on the side where the bar was, the cutter's bar, and then I would hold onto this bar and pull myself out.

Q. You mean to tell us you climbed up over this bar and then—you go ahead with it.

A. Yes, and then I would get onto the steps and go up the steps and up the walk and down the steps.

Q. If you were going into another pit, you would reverse the process, and step over the table and then slide on down, is that right? A. Yes.

(Testimony of Anna Belle McGrady Wuthrich.)

Q. You are not working now?

A. No, I haven't worked since 1944.

Q. This pit is about what size? [126]

A. Well, I would say a girl's standing room, between her place, the shelves which they put their lumber on—above the table is a place to stack your different cuts and different grades. I would say that it was four and a half feet.

Q. The long way?

A. And about three feet the other way.

Q. How close were those rolls up to that table?

A. Well, about three feet. From the front of the table over to the rolls I would say was three feet. I am not sure.

Q. Let us say that here is your cutoff saw (illustrating) and here is this pit. Back here are the rolls.

A. Yes.

Q. How far from these rolls to where this girl is standing near the end of this table? You can refer to these pictures, if you want to refresh your recollection. I think the pictures show where the rolls were. Were the rolls tight up against the table?

A. I think they were.

Q. Were they so tight against this table that you could not walk between the rolls and the table?

A. No, you can't walk between the rolls. There was 1 and 2, Number 1 and 2, you could walk into.

Q. Why could you walk into those and not the others?

A. They were on the end, and there was room to walk in. [127] The rolls went up here (illustrat-

(Testimony of Anna Belle McGrady Wuthrich.)
ing) and came to an end, and you could walk in to Number 1 and 2, always from the time I started there. These pictures looks like the place after it was remodeled.

Q. What changes were made there?

A. Well, they took the rolls out from their present place and put them down on the end of the box factory, and then they put a belt, a powder-driven belt, under their work tables, and they took away the lumber, all that did not have to go to the resaw, and stacked it on trucks here, and this here, they did not have to bother with that, it went right to the resaw, and then the cull lumber and the scrap lumber, different grades, we just took them off and threw them under here on a belt and it carried them away.

Q. So, the operation was the same except that there were no rolls there. Now, right under this is this belt, is that correct? A. Yes.

Q. About how broad a belt is that, how wide?

A. I would say it is sixteen inches.

Q. About sixteen inches? A. Yes.

Q. Did you work there after these changes were made?

A. Well, they changed in the spring of 1944 and I worked until July. [128]

Q. Did you handle just as much lumber? Did the saws work just as fast?

A. Yes, the saws worked fast. There was a time before I left there that they took the night

(Testimony of Anna Belle McGrady Wuthrich.)
shift off, I guess, because there wasn't enough employees to keep the night shift going.

Q. They did work clear around the clock for a while, three shifts?

A. Yes, when I first went there they worked three shifts.

Q. Now, they are working how many?

A. I don't know what they are working now, but in 1944 they worked only one.

Q. They got down to one shift then?

A. Yes, they did, but whether they put them back or not, I don't know.

Q. Was just as much material handled?

Mr. Powers. We will admit there was as much and more. The change was made for efficiency purposes.

Mr. Sims: That is fine.

Q. About how long have you known Galina Smith?

A. Well, I met Galina in 1936. I worked with her.

Q. You worked with her for about how long?

A. I would say a couple of months, then.

Q. You saw her then every day, several times a day?

A. When I worked with her there, I saw her every day. [129] I worked right with her, yes.

Q. Did you work on the night shift at any time, in the box factory? A. No, I never.

Q. Did she work days when you were working with her?

(Testimony of Anna Belle McGrady Wuthrich.)

A. No, she worked nights. You asked me when I first knew her.

Q. Yes.

A. I worked with her in 1936, but not at the box factory. She worked nights at the box factory and I worked days. The fact is I was pretty proud to see her when I went down there because most of the girls were strangers to me and when she came in I felt that there was one girl there that I knew.

Q. You had a friend at least? A. Yes.

Q. One you had know a long time?

A. Yes.

Q. I suppose you left about 4:00 or 4:30?

A. No, I left at 5:00.

Q. She would be there for a few minutes before you left?

A. Ten to twelve minutes, usually.

Q. Of your own knowledge and from your own observation, did she have any difficulty with her knee, before she was hurt in May, when she went to the hospital? [130]

A. No, I never knew her being sick. Of course, I didn't see her every day, only when I worked with her, but I seen her working other places during this time, from the time I worked with her the first time until the last time.

Mr. Sims: You may cross-examine.

(Testimony of Anna Belle McGrady Wuthrich.)

Cross Examination

By Mr. Powers:

Q. Where had you worked with her, Mrs. Wuthrich? A. At the Pine Tavern in Bend.

Q. A restaurant over in Bend? A. Yes.

Q. What period of time was that, do you recall?

A. Well, it was in 1936. I went to work there when the Pine Tavern opened.

Q. You worked there together, about how long?

A. Well, I would say a couple of months.

Q. Am I correct in this, that the next time you saw her working was when she came down to Shevlin-Hixon?

A. Oh, no, I seen her working at an ice cream parlor in Bend.

Q. That is another restaurant?

A. Pardon?

Q. Is that a restaurant?

A. It is an ice cream parlor. I seen her going to the show, and I was always running out to her house and she [131] has been to my house a few times.

Q. You worked days at Shevlin-Hixon and she worked nights? A. Yes, sir, I did.

Q. So, you were not on the same shift with her?

A. No.

Q. Getting down to where you worked, you said you got down on your feet and then got down onto the floor?

A. I would get down and hold onto the table

(Testimony of Anna Belle McGrady Wuthrich.)

with my hand and jump down into my working place.

Q. In other words, you would have some support from your hands in getting down?

A. Well, if I didn't, I wouldn't have been able to work because I don't fall easy. I was very conscious of the fact, too.

Q. That was more or less a natural way for you to do it, to take hold of the table, when you got down, to kind of jump in that way?

A. Yes, that is right. I could climb out of there much better than I could get in to it because, down in the pit, you can see where you are and see where to put your feet to pull out and, in going down backwards like you would, you can't see those places, so you have to get on the table and then down into the pit.

Q. When you went down, you came down backwards like this (illustrating)? [132]

A. Not off the table, but to go over from the steps, over to the table, I naturally had to go backwards. If I had gone straight into my pit, I might have found a place to put my feet, but I can't go in that way, because I have to hold to something.

Q. You say that there are two ways in getting over to the table; one, you can step over the bar and, the other, there is no bar to step over, is that right?

A. That is right. On one side, the best I remember, there was a bar and the cutter stood facing the lumber coming this way (illustrating). That

(Testimony of Anna Belle McGrady Wuthrich.)

was on his left. It would be on my right. On this side, I don't think there was anything like that, because that is where we stacked most of our lumber. There were shelves or boxes or something to stack these different cuts in.

Q. You had the choice of going either of two ways. You preferred the one where there was no bar?

A. No, that was the hardest place to get over.

Q. So you took the other one?

A. Well, I took either one. I have been over them both.

Q. But you found the other one the harder. That is what I understood you to say?

A. If there wasn't a lot of lumber stacked in my way here, then, it was easier.

Mr. Powers: I believe that is all. [133]

Redirect Examination

By Mr. Sims:

Q. Would there be lumber stacked upon that table sometimes when going in there?

A. Well, we put our O.K. cuts—we would stack one here and one there. We would stack them that high (illustrating). We had marks on the back of the table for the different cuts and we would stack up to them. Sometimes, we would have two or three stacks on the table, because it is fast work, and it is easier to consolidate them and bring them up and throw them into the same place.

Q. You say it is fast work?

(Testimony of Anna Belle McGrady Wuthrich.)

Mr. Powers: There is no claim that there is any lumber there on this table at all. I think we are going quite far afield.

The Court: Go ahead.

Q. (By Mr. Sims): What do you mean by that?

A. The cutoffs are the fastest working I worked on in there because they are cutting like this (illustrating).

Q. Does the sawyer then wait for the punk to get into her working place?

A. In the morning, she gets in while he is—well, I will put it this way: We have a whistle that blows three minutes before the morning whistle. We are supposed to be in our working places when the whistle blows, and maybe the saw [134] was running when the relief girl would come down to take her place. When she comes down—when she starts to work, the other girl climbs out, and sometimes, when the girl comes back, the girl that works in that particular place, she gets down on the floor and then the relief girl leaves.

Q. Does the sawyer continue with his operation, or does he wait for the change of punks to be made and the material to be gathered up and the table cleared away?

A. Well, I imagine if there is any difficulty in her getting in, he would stop and, if not, he would keep operating.

Mr. Sims: I think that is all.

Mr. Powers: That is all.

(Witness excused.)

Mr. Powers: Dr. McClure is here. We have not reached our case but I wonder if we can put Dr. McClure on out of order?

Mr. Sims: That is agreeable. [135]

DR. CHARLES R. McCLURE

was thereupon produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. Your name is Charles R. McClure?

A. Yes, sir.

Q. You are duly licensed to practice medicine and surgery in the State of Oregon, are you?

A. Yes, I am.

Q. Where do you have your office, Doctor?

A. I am in the Selling Building, Sixth and Alder Street.

Q. You have been located there for how long?

A. Since 1912; it is almost thirty-five years.

Q. Do you specialize in any particular branch of medicine or surgery? A. Yes.

Q. What is that? A. Orthopedic surgery.

Q. Orthopedic surgery? A. Yes.

Q. Are you connected with any hospitals in Portland?

A. Well, I have been connected with all of the hospitals. For a great many years I was orthopedic surgeon at the Multnomah County Hospital; Doernbecher Hospital for Children, [136] over ten

(Testimony of Dr. Charles R. McClure.)

years; associate surgeon, Shriners' Hospital for Crippled Children, and for twenty-five years professor of orthopedic surgery, University of Oregon Medical School.

Q. You have taught this orthopedic surgery at the Oregon Medical School here in Portland?

A. Yes.

Q. In teaching there, did you have a student by the name of E. G. Chuinard? A. Yes.

Mr. Sims: I don't think that is important.

A. I remember him very well.

Q. (By Mr. Powers): Are you connected in any way with the State Industrial Accident Commission?

A. Yes, I am their chief examiner for Portland on a part-time basis, have been for many years.

Q. In your work, do you have occasion to diagnose bone injuries and knee-joint involvements, and things of that sort?

A. Many times, every day.

Q. Dr. McClure, you examined Mrs. Galina Smith, the plaintiff in this case, for us?

A. I did.

Q. Will you state to the jury when that examination was made?

A. I examined Mrs. Smith on May 22, 1944.

Q. Did you take X-rays? A. Yes.

Q. Have you had an opportunity also to examine the other X-rays that have been made here by other doctors of Mrs. Smith. A. Yes.

Q. The two X-rays made in June, 1943, at Bend

(Testimony of Dr. Charles R. McClure.)

and the series of X-rays made here in Portland by Dr. Chuinard's office? A. Yes.

Q. In addition to that, in addition to those and your own X-rays, there was another X-ray that was introduced into evidence here yesterday, which I think was taken just a day or two ago. If we might see that X-ray so that the doctor may have it, please. I think it is Exhibit No. 37. You have examined all of them except this one? A. Yes.

Mr. Powers: Could we have the earlier X-rays, No. 35 and 36, handed to the doctor.

Q. I will ask you this: Did you find any arthritis in the plaintiff's knee?

A. I found none, no; that is, I saw nothing in the X-ray that I considered arthritis from an X-ray standpoint. That is what you mean?

Q. Yes. Take a look, Doctor, and compare those. I think [138] the box is right there.

A. I can see well enough, unless you want me to show them in front of the jury. I can see well enough. Do you want me to look at this again?

Q. I want you to say whether there has been any development of arthritis.

A. Since the first picture to this last picture?

Q. Yes, since the first picture. The first X-rays are marked 1 and 2.

A. I see no additional—I see no changes or additional development in the X-rays since the original ones and the ones you just handed me, as having been taken this week.

(Testimony of Dr. Charles R. McClure.)

Q. In the first X-rays, do you see any roughening of the bone, or whatever that is in the first ones taken? That will be in 1943.

A. I will have to find those.

Q. June, 1943.

A. You asked me if I saw any roughening in the first pictures.

Q. Do you see any roughening there?

A. Well, I see a suggestion, a suggestion of what you might call roughening or erosion or a little defect in the surface of the lower end of the thigh bone where it enters into the knee joint, call it. That is what we call a condyle. But the same thing is still shown in the last film. [139]

Q. Has there been any development, any increase in that which you see at all?

A. No, no increase at all that I can see.

Q. I will ask you, Doctor, to assume that the plaintiff jumped off a table and had a pain in her knee and moderate swelling in that knee, and went on working that night, and later she went to the hospital. You have already had this history. I will ask you if that erosion or roughness could have developed in a period of three weeks, in your opinion?

A. It could not.

Q. Is that a slow process, or what would you say, Doctor? Can you explain that to the jury, please?

A. Well, it is a slow process, I think, in view of the other findings in the picture, yes.

(Testimony of Dr. Charles R. McClure.)

Q. In your opinion, could that be the result of jumping off of a table at that time.

A. Two or three weeks previously?

Q. Yes. A. It could not.

Q. What history did the plaintiff give to you?

A. She told me that on May 15, 1943—that was a year before I saw her—while working in a box factory, on high cutoff, she jumped a distance of about three feet onto a pit floor; that when she landed she experienced a sharp pain in the knee and had to quit work. She said [140] considerable swelling developed, which persisted over a period of two weeks; she was taken to the hospital at Bend, Oregon, and there was seen by Dr. Paul Woerner; that she left the hospital but returned on May 25th and remained for a couple of weeks; she also said it was ten or twelve weeks before she did any work again at the factory; in fact, she was only able to carry on a short period, for a period of eight or ten days, and that she quit on account of her knee, and that since that time she has done nothing except her house or home work. That was the history she gave me.

Q. Did you examine her knee at that time?

A. I asked her concerning the knees. She insisted her complaints were confined only to her right knee. She reported a loose body within the knee that manifested itself intermittently on both sides of the joint, that it had always a feeling of hardness in it, and which she pushed back with her fingers, and, when reduced, she was able to walk

(Testimony of Dr. Charles R. McClure.)

again. Her report to me indicated that that lump or mass came out rather frequently. Those were her complaints.

Q. What did your examination disclose, roughly?

A. In examining her knee, her knee on that date had no swelling, and on that date I was unable to see or feel with my hands or demonstrate this body that she said came in and out intermittently. In other words, it did not show up on the date I saw her.

I tested the integrity of the supporting ligaments of the knee joint, both lateral ligaments, and the ligaments that cross the joint inside, called the crucial ligaments. These ligaments were all intact and in perfect condition. She had perfect motion in the knee. On motion, there was a little fine crackling or creaking in the joint, what we call crepitus. Those were the physical findings.

Q. Is that crepitation unusual?

A. Is that an unusual thing?

Q. Yes.

A. No, it is rather common. I have it in my knee right now. A lot of people have it that have never been hurt. It may affect a person who never had any injury. After that examination, I had X-rays taken.

Q. What do the X-rays show?

A. These X-rays showed what I started to say, a typical loose or foreign body within the joint. The X-rays also showed a defect of the joint sur-

(Testimony of Dr. Charles R. McClure.)

face of the femoral condyles. That is the lower end of the thigh bones that makes up the joint.

Q. Did you find any evidence of injury to a cartilage?

A. Well, now, you will have to make definite what you mean by "cartilage."

Q. Semilunar cartilage. [142]

A. No, I did not find any injury to a semilunar cartilage—did not find any semilunar cartilage injury at all.

Q. This foreign substance that you could see, is that an unusual thing to find? Do you find those in knees at times?

A. Well, it is not unusual to an orthopedic surgeon. I think to a great mass of people it may be fairly unusual but nothing unusual to me.

Q. What is the common reference to that type of foreign body? What is it called?

A. Well——

Q. A joint-mouse?

A. It has been called a joint-mouse.

Q. Does it move around some?

A. That is a characteristic. They tend to shift their position a lot or a great deal, depending on where they are located, and whether they have some little attachment to a piece of ligament or piece of tissue.

Q. You examined Exhibit No. 37. That was the one taken, I think, Monday of this week by Dr. Chuinard.

A. Yes.

(Testimony of Dr. Charles R. McClure.)

Q. You did see this joint-mouse or a foreign body in there? A. Yes, it is still there.

Q. Where is it located with respect to where it was when you saw it in your X-rays?

A. Well, it is almost in the same place. I will find my [143] films here. I don't seem to be able to locate mine for the present. Are mine here among these?

Q. Pardon me?

A. Are all of the films here?

Q. No, you probably do not have them all.

Mr. Sims: Here is an envelope here, Mr. Bailiff.

Mr. Powers: It should be 31 or 32.

Mr. Sims: No X-rays here.

Mr. Powers: No. 2 would be the one taken in 1943.

Mr. Conway: May I see those, please, all the X-rays?

Q. (By Mr. Powers): Here are two taken, I think, at Dr. Chuinard's office, about the same as yours in May, 1944. Could you examine those and—— A. Now, what is the question?

Q. Look at this series of X-rays and the two you took yourself. You have had an opportunity to examine them just a day or two ago.

Doctor, have you seen anything in the X-rays in evidence here to indicate that this foreign body came as a result of injury to the semilunar cartilage? A. I do not.

Q. Will you explain to the jury, first, as to whether a semilunar cartilage would show up in an X-ray?

(Testimony of Dr. Charles R. McClure.)

A. No, a semilunar cartilage is not discernible in an X-ray film. There are no calcareous or lime deposits in [144] cartilage. It does not show in an X-ray picture, so it is impossible from an X-ray picture to diagnose an injury to a semilunar cartilage.

Q. If this is what is called a calcified semilunar cartilage, could you tell that from the X-rays?

A. If you have a calcified semilunar cartilage, which is rare, very much of a rarity, you will see the outline of a cartilage and you will see a white mass and see that there are calcareous deposits within that. There is no suggestion of any such condition in any of these films.

Q. Can you state to the jury there is no calcified semilunar cartilage in this joint at all?

A. There is none.

Q. It has been suggested here that this foreign body that is shown in the X-ray—first, state to the jury where that foreign body, in your opinion, came from.

A. It came off the surface of the joint.

Q. What caused it to come off?

A. Well, now, in this particular instance, I will have to give the general nature of causes. I know from my teaching and experience and practice that those things drop or come off the surface of one of the bony joints or surfaces, due to some changes in the circulation that causes death, that is to say, necrosis of a part of the joint surface and, when that occurs, that portion of the joint surface that is [145] involved tends to gradually loosen and, in

(Testimony of Dr. Charles R. McClure.)

time, fall or drop off. It is due, as I say, to a change in the circulation that carries nourishment to the joint surface and, for some reason or other, the lumen, which is the inside of this small blood vessel that supplies that particular segment of the joint surface, becomes closed off or blocked, so that there is no blood supplying that joint surface. In time, it loosens like the bark of a tree, where pieces of bark loosen and fall away, where the sap has been cut off or dries up. It may drop off or it may fall off.

Q. That kind of process, does that have a name?

A. Yes, we call it osteochondritis dissecans.

Q. Osteochondritis dissecans. Would you explain that word? What is "osteo"?

A. "Osteo" means bone and "chon", that refers to cartilage, so it is an inflammation of the bone and cartilage. "Dissecans" has reference to the splitting up of pieces of cartilage.

Q. Is it in the nature of erosion?

A. Well, it is not an erosion until after it drops off. It leaves a little defect on the joint surface and that is where the erosion comes in. It is not an erosion until it drops off.

Q. Can you see that erosion in the films here?

A. I can see the place where it looks like it had been; [146] that is, the probable site.

Q. What does "itis" mean?

A. Altogether, "itis" means inflammation, so that "osteochondritis" means inflammation. Of course, I think the term is wrong in this particular

(Testimony of Dr. Charles R. McClure.)

instance because there is no inflammation about it.

Q. It has been suggested here that, because of the swelling, there was blood in the knee and that the residue of that fibrin, as Dr. Chuinard called it, would not be absorbed—most of it would be absorbed by the body but what was left would form a mass which would ossify or calcify. Would you state to the jury whether, in your opinion, that could occur or whether it does occur?

A. In all my experience over practically thirty-five years in this kind of work I have never contacted or seen a case where I had any reason to believe any such a thing ever happened.

Q. Assuming, Doctor, that the plaintiff now has full range of motion in her knee, as found by Dr. Chuinard on Monday, and that there is no atrophy or shrinking of the leg or thigh and the ligaments are in contact, and that she has a stable knee, will you state to the jury whether that situation would be consistent with any derangement of the semilunar cartilage, causing her trouble?

A. It is rather inconsistent, very inconsistent, if I may [147] make it that.

Q. What does that indicate to you, Doctor?

A. We see a great many cases where they have injuries to the semilunar cartilages, where there has been pressure or disability and where there have been repeated lockings of the joint, and with each locking of the joint the joint becomes irritated, you might say inflamed; the blood is segregated; and that causes repeated swellings and, due to the

(Testimony of Dr. Charles R. McClure.)

pain associated, and the necessary favoring of the knee on account of these lockings, they invariably develop varying degrees of waste or what we call atrophy in the muscles controlling the knee joint, particularly the lower part of the thigh. It would be my opinion that there is nothing within that knee joint causing such trouble, or she would have more symptoms or more findings than you describe.

Q. It has also developed this foreign body could be felt superficially by Dr. Chuinard a couple of days ago in the area or region where it is shown in the X-rays. Will you state to the jury—it having been in that location now for a period of two years or more—whether it would be a difficult matter to remove that?

A. Well, from a skilled surgeon's standpoint, it is a rather simple operation, a simple matter to remove it.

Q. Would you expect any operation and hospital bill would [148] cost from \$400 to \$750 to remove that?

A. I don't know, but roughly speaking, a charge of \$400 to \$700 to remove it—

Q. Four to seven hundred—

Mr. Sims: Counsel does not mean that.

Mr. Powers: I mean four hundred to seven hundred fifty.

Mr. Sims: The testimony of Dr. Chuinard was that the hospital and doctor bills would be between four and five hundred dollars. I am sure Mr. Powers inadvertently misquoted him.

(Testimony of Dr. Charles R. McClure.)

Mr. Powers: I took what Mr. Sims said in his opening statement. I don't know whether he had any testimony on that or not.

Mr. Sims: There was Dr. Chuinard's testimony.

A. Well, in general, that might be a very liberal bill, but I would not object to it if they could pay it. I think a doctor is entitled to anything he can get, like anybody else, but I think that would amply cover any expenses.

Q. (By Mr. Powers): What about the Accident Commission, what is allowed for that?

Mr. Sims: I do not think that is proper, your Honor.

The Court: Objection sustained.

Q. (By Mr. Powers): I will ask you whether a reasonable charge might be in the neighborhood of \$100 to \$150.

Mr. Sims: That is leading and suggestion. We object [149] to that. The doctor is competent to testify. Counsel has been leading him all the way through.

The Court: Reframe your question.

Q. (By Mr. Powers): State, if you can, what a reasonable charge would be for that?

A. Well, to begin with, the hospital bill would not be much, because it would not be necessary to stay in the hospital more than probably ten days at the most; anywhere from seven to fourteen days, so there would be the hospital bill plus the surgeon's bill. I think the surgeon's fee for that sort of operation should be anywhere from—I think a fair

(Testimony of Dr. Charles R. McClure.)

bill would be anywhere from \$150 to \$200, somewhere in that neighborhood.

Q. Would you see any reason for going into the joint, other than to just take that foreign body out?

A. It would make a bigger operation out of it, but I see no occasion for it.

Q. Doctor, in your opinion, a person jumping from a table somewhere between around 33 to 36 inches onto a wooden floor, without any trouble with the knee before, would she land with such force that she could actually break a part of the bone off that femur, if her joint was in good condition before?

A. I think it would be very unusual for it to happen. I have never seen it happen. I suppose in this world anything [150] can happen, but it would be most unusual. That is all I would say about it.

Mr. Powers: I believe that is all.

Cross Examination

By Mr. Sims:

Q. How much does it cost a day now for hospitalization?

A. Well, it varies on what type of room you have. The rates now run anywhere from ten to twelve dollars a day.

Q. Nurses are charging \$1 an hour, \$24.00 a day, aren't they?

A. Yes, if you need them, that is what they are charging.

(Testimony of Dr. Charles R. McClure.)

Q. What do they charge in a hospital for anesthesia?

A. Well, now, I won't say—I will say ten or fifteen.

Q. What do they charge for the use of the surgery?

A. That is about ten or fifteen dollars.

Q. Do they charge in addition to the expense for anesthetic? A. Do they what?

Q. Do they make a charge in addition to the charge for anesthetic for the use of the surgery and room? They make another charge for bandages and medication?

A. Any necessary dressings or medicine are all extra.

Q. There is a little more to the history. Mr. Powers did not suggest this lady has lost thirty pounds in weight, she says, because of pain and suffering, and due to difficulty with this knee, and that for many years prior she had [151] had no difficulty or no trouble with the knee.

Having that further fact in mind, Doctor, and the fact that she experienced this pain and swelling in the knee the night of May 15, or the morning of the 16th, whatever it might be, having those things in mind, what would be your opinion as to the best practice in removing the foreign body? Would you go further and explore to see if, in addition, there was a fractured cartilage?

A. Based on the knowledge I have, I would not go further than just removing the foreign body.

(Testimony of Dr. Charles R. McClure.)

They are very simple things. They are right up near—I would get it out and quit.

Q. How do you account for the fact, if it is a very simple thing, that this foreign body always appeared in the same location?

A. Well, the interior of a knee joint is very extensive, ramified like. At the present time, the foreign body seems to be even above the bursae. In some cases there is a small opening between the bursae and the main part of the joint through which this goes. Sometimes, or quite often, within that bursae, and it don't seem to just make the proper maneuver but slips or slides back through it down into the knee joint, or else the bone becomes smaller, or sometimes a fragment becomes attached to some surface, some portion of the lining of the bursae, by a piece of tissue, something [152] like an adhesion, you might call it, and that might limit this excursion. But, at any rate, the last two of the films show this located up out of the knee joint proper.

Q. In an area where it would not cause locking of the knee?

A. It would be very unusual to cause locking, in that area.

Q. We have something more here than the foreign body, because there is a locking of the knee. Could there be a fractured cartilage in there that is causing the locking, in addition to the foreign body?

Mr. Powers: There is no evidence of any locking of the knee.

(Testimony of Dr. Charles R. McClure.)

Mr. Sims: I beg your pardon.

Mr. Powers: Dr. Chuinard said, as I understood, there was a catching in the knee, but no locking.

Mr. Sims: There will be evidence of that. There will be evidence that there is locking, even causing falling.

Q. You have my question in mind?

A. I think I understand it. In that connection, it is very possible that the fragment or, as we call it, the joint-mouse, may get between the bone and the quadriceps ligament, the ligament that connects this muscle with the knee-cap and shin bone, in such a way as to simulate locking, but as far as the so-called typical locking is concerned, that would not be expected there.

Another thing, if this amounted to a typical [153] locking, as you intimate you are going to bring out, to such an extent that she would fall occasionally, I think it would be a story—almost a story . for the storybooks that she did not have more findings than Dr. Chuinard found. We know we would expect to find a great deal of atrophy and we would expect to find swelling of the joint, a very irritable joint, expect to find some looseness of the joint, and evidently it is not present, so I would have to take that with a grain of salt myself, any such occurrence as you describe.

Q. In other words, you are saying you do not believe Dr. Chuinard when he said he felt something?

A. No.

Q. We have Dr. Hosch's testimony also.

(Testimony of Dr. Charles R. McClure.)

A. As far as I am concerned, if this lady tells me she frequently has felt something there and pushes it back in—I don't doubt they felt something there.

Q. In spite of this history that you have, you think \$150 is what you would charge?

A. I said to go in and remove that foreign body, I think \$150 would be a liberal fee, even in these "hifalutin" days we are having. If he was going to explore the whole joint, the whole knee joint, undoubtedly he would be entitled to \$250 or \$300, but I don't think that is necessary.

Q. Why do you think there is more probability of finding [154] calcium in cartilage than finding calcium in a fibrous mass or hematoma, or do you think that?

A. That would be easy to explain, if you were a doctor.

Q. I am not. That is the reason I am asking you.

A. This is the cartilage (illustrating); this is the tissue which covers the end of the bone (illustrating). When the circulation, or a portion of the surface, is stopped or cut off by some contraction or intrusion of the vessel, when this cartilage falls off there are a lot of tiny tissues that go with it. That is what shows in the X-ray picture. The cartilage does not show. Where you get the shadows are the bone cells in that piece of cartilage, though the typical cartilage itself has no bone cells in it, and it does not show. Any clot that is formed

(Testimony of Dr. Charles R. McClure.)

in the fluid that is in the knee joint, whether it is blood or just whatever fluid it is, in my experience has never been associated with any calcareous deposit, because there are no bone cells; there is nothing to form any bone.

Q. So you feel that if there is a floating mass there, it would come about because of a sloughing-off or jarring-off? A. Yes.

Q. That is what you had in mind?

A. Yes.

Q. Incidentally, Doctor, this long word, osteo—— [155]

A. ——chondritis dissecans?

Q. Yes. Dr. Chuinard further said that that is a misnomer and that the “itis” should be out of it.

A. I agree with him on that. Technically, there is no “itis” to it, but that term has been used for decades and it still is.

Q. You are rather proud of your job as an instructor, as far as Dr. Chuinard is concern?

A. I was. He was an attentive student, and was later house surgeon at Multnomah County Hospital. He did work at the Shrine Hospital while I was still there. Since that time, he has developed into one of the leading young surgeons of the city in that line of work, no question.

Q. He is doing work at the Shriners' Hospital for Crippled Children?

A. Yes. He is doing it, as far as I know. I am not going out there to check up or anything, but they would not keep him there if he was not

(Testimony of Dr. Charles R. McClure.)

good. The fact of the matter is, in my own observation, he is doing good work.

Q. Doing a good job? A. Yes.

Q. Does it take much jar to fracture either the internal or external semilunar cartilage?

A. In my experience, they are never fractured by a jar.

Q. What happens to a kid on a football field when he comes [156] in to you and says "They threw a block at me and it hurts like——"

A. Undoubtedly some jarring but there was a great deal more of twisting or tortion and strain.

Q. You are objecting to my use of the word "jar" and want to use the word "twisting", is that it? A. Yes.

Q. If I should get up on that table, jump off, and make a poor landing, it would not be unusual to fracture the internal semilunar cartilage?

A. I would say it would be very unusual.

Q. You often have fractured semilunar cartilages where people were sitting in automobiles colliding with another car, just on account of the traffic.

A. When the jar comes, it is not just a jar, but there is some kind of twisting or tortion or strain at the same time.

Q. It does not take very much of that sort of thing, then, to cause a fracture of the cartilage, is that right?

A. I think it is more of a strain than you intimate.

(Testimony of Dr. Charles R. McClure.)

Q. The cartilage, then, is pretty solid, next to the bone in rigidity? A. Yes.

Q. But, nevertheless, the muscles, ligaments and tendons around this joint could not make a solid joint where there is a turning pressure in there?

A. The cartilage lies inside the joint and attached to what we call a capsule. From this capsule run the ligaments, so if the torsion or strain is sufficient to twist that out, it may split the cartilage where it is attached.

Q. How many patients did you see the day you saw Mrs. Smith?

A. Oh, gosh, that has been over two years ago. Excuse me for saying "gosh."

Q. I said, how many a day?

A. Well, I have no idea whether I saw one or ten. I more likely saw a dozen. I don't know. It depends on what day of the week it was and how busy I was and whether I had to go in court like I have had today. The last few years, I have been cutting down on my work, so I may not have seen as many patients that day as ten years ago. I don't want to go into a lot of history here.

Q. No.

A. The last three or four years, I have been cutting down very rapidly. I have not been seeing as many.

Q. The probabilities are that you saw ten or fifteen patients that day?

(Testimony of Dr. Charles R. McClure.)

A. I would say yes. It is safe to say I saw at least ten. I don't know.

Q. You don't remember any of the other patients?

A. I have no means of knowing what day of the week it was or anything about it.

Q. You knew you were going to make an examination of her [158] for the defendant here?

A. Of course, I knew it because they sent her to me.

Q. You saw her only once. You did not see her this week? A. No.

Q. I believe you have already been asked, and that you have answered that the films don't show any hypertrophic arthritis?

A. They do not.

Q. What is hypertrophic arthritis?

A. Hypertrophic arthritis is that type of arthritis identified with irregularity or marked joint deformity. Nothing shown in this case at all like that.

Mr. Sims: That is all. [159]

CLARA LONG

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

(Testimony of Clara Long.)

Direct Examination

By Mr. Sims:

Q. Are you the lady they call Peggy?

A. Yes.

Q. You are Clara Long, that is your name?

A. Yes.

Q. You live over in Bend? A. Yes.

Q. How long have you lived over there?

A. About eight years.

Q. I told the jury the other day that there was a lady that had difficulty in getting in and out of the pit. Were you the lady?

A. No, I was not.

Q. Do you know who that was?

A. I can't remember right now who that was.

Q. Well, I was not sure whether it was you or not. Did you work at the Shevlin-Hixon mill?

A. The Shevlin-Hixon Box Factory.

Q. You worked in the box factory part of the mill? A. Yes.

Q. What did you do there? [161]

A. Well, I punked the cutoff.

Q. You punked the cutoff? A. Yes.

Q. What does that mean?

A. I grade lumber for the cutter as he cuts it.

Q. Were you working there in May, 1943?

A. Yes, sir.

Q. Were there rolls there at that time?

A. There was.

Q. Were they power-driven, or were they gravity?

(Testimony of Clara Long.)

A. They were power-driven rolls.

Q. You are sure of that? A. Yes.

Q. Was there a switch that turned the power on and off? A. Yes.

Q. I understand the rolls were used to take the material that you sorted and graded away from where you were working, is that right?

A. Yes.

Q. How were you girls dressed for that job?

A. We would have to wear slacks.

Q. You have to wear slacks? A. Yes.

Q. How did you get in and out of your working position?

A. Well, you walk up the stairs, up to the catwalk, down [162] to your cutoff you were going into——

Q. Let us take No. 4 to be specific. Galina says that is where she was hurt. How did you get into that one?

A. I would walk up the catwalk and walk down to 4, walk down the steps and step over this bar onto the steel table and jump off into the pit.

Q. Do you work at the mill now?

A. Yes, sir, I do.

Q. How do you get from the table down to the floor?

A. You just walk in there now, like you walk in up to your kitchen sink, or something.

Q. You say just like I would walk into your kitchen sink?

(Testimony of Clara Long.)

A. Up to the kitchen sink or up to the table at home or anything.

Q. How is the material taken now from that 4 position?

A. Oh, you pile it up so high on the table and whenever the cutter turns around to pick up another board, you grab a bundle of that and put it under the table onto the belt.

Q. Why is it you wait until the sawyer turns around? Is this stuff slid down at you?

A. Yes.

Mr. Powers: It is leading.

Mrs. Sims: Q. How does this saw work?

A. It is going back and forth all the time, and, when he turns around to pick up a board—— [163]

Mr. Powers: We will object to that, your Honor. There is no claim of injury due to any sawing work in any way. The claim of injury here is through not having a step to get down into the place and into the pit, and now they have made a claim that the rolls were changed and that they should have been changed before, so they could walk in. There is no issue as to this and there never has been as to the saw.

The Court: Go ahead.

Mr. Sims: Q. How far is that saw above your table that you jump down from?

A. I would say it is about two feet or two feet and a half. I don't know.

Q. Could you reach the saw from the floor?

A. No.

(Testimony of Clara Long.)

Q. How close to the saw were you?

A. Well, that table is about three and a half feet from the front of it to the back, and then that incline goes up about two feet.

Q. There is a sliding steel table?

A. A sliding steel table that the lumber slides upon and you are about three feet from that, where that lumber comes down that incline there onto this three-foot table.

Q. Is the top of the table covered with anything?

A. Yes, steel.

Q. It is steel? [164] A. Yes.

Q. That is all steel? A. Yes.

Q. Were you working the night shift in May?

A. No, I was not.

Q. You were working the day shift?

A. The day shift.

Q. In what particular, if any, is the job of punking different at night and at daytime?

A. They don't have as many cutters and punks on at night as they do the daytime. During the day, the cutoffs are all running. During the night, there was only two or three running.

Q. After the sawyer, at night, would use up the lumber that is stacked there at Number 3, say, then would he move to Number 4?

A. He would then move to Number 4 or whatever other cutoff he was supposed to move to.

Q. At the time the power-driven rolls were there, what did the punk have to do when the sawyer moved?

(Testimony of Clara Long.)

A. The punk would have to climb out of there and climb down into the next one.

Q. How would the punk then get into working position?— In the next pit, the one that she was in?

A. She would have to do the same thing as she did before. [165] She would have to go up those three steps from where she was, come out of this pit, have to go up three steps and down the catwalk to the next cutoff and then down the steps and over the bar and jump across.

Q. And then jump? A. Yes.

Q. How high is this table above Number 1?

A. I would say about 36 inches.

Q. Was there a difference in the height from the floor to the table in the different pits?

A. Yes.

Q. Why was that?

A. Well, some punks would measure—

Q. I do not mean punking. I mean the actual distance from the table to the floor. Was there a difference?

A. There was a platform put in there.

Q. I will ask the Bailiff to hand you Exhibits 27, 28 and 29. Can you show any platform in any of these exhibits? A. Which one?

Q. Well, you take any one and tell us the number on the back of the exhibit.

A. This is Number 27. This is the platform right in here (indicating).

(Testimony of Clara Long.)

Q. Would you step down so the jury can see, please? A. There is a table and platform.

Q. Would this platform vary in thickness, or were they decked with the same type of material?

A. They were decked with the same type of material.

Q. Some would be more worn than the others?

A. Yes.

Q. Take a look at Exhibit No. 28 and tell us if that shows anything different. I don't know whether the jurors in the middle can see these pictures or not. These two jurors did not get to see the platform you are talking about.

A. This is taken from where the sawyer stands.

Q. Yes. You can resume the witness stand. Before that decking was put in, as shown in Exhibit No. 27, how much further was the table to the floor? In other words, when this decking went in, how much did it build up the floor, if you know?

A. Well, I would say anywhere from an inch to an inch and a half.

Q. About how often would this material drop down from the saw as the sawyer stood there working?

Mr. Powers: That cannot possibly have any relation to the accident.

The Court: Go ahead.

A. Just as fast as the cutters wanted to cut. If they wanted to catch that saw each time it came over, the board came out there and they put it back.

(Testimony of Clara Long.)

They cut some boards [167] pretty fast, the cutters; some pretty fast cutters.

Q. Have you worked there since the power-driven rolls were taken out?

A. Yes, I have.

Q. You are still working there? A. Yes.

Q. Is there much material taken——

Mr. Powers: We will admit there is as much or more.

Mrs. Sims: That is all. Thank you.

Cross Examination

By Mr. Powers:

Q. There are two ways of getting down off the table. You could go over the bar if you wanted to, but if you went in from the other side there would be no bar there, is that right? You could go down the other steps and there would be no bar to go over, is that right? A. Yes.

Q. It was up to you to select which way you wanted to go, in that respect?

A. Yes, but generally whenever I went down in there there would be lumber piled up, because the noon whistle blows or something.

Q. You worked in the daytime? A. Yes.

Q. You did not work at night? [168]

A. No.

Q. You would not know whether there would be lumber piled up there at night or not?

A. No.

(Testimony of Clara Long.)

Q. Tell the jury how you got down from the table, down to the floor.

A. I generally jumped down.

Q. When you did not jump, how did you do it?

A. Well, I don't know as I ever got in there any other way.

Q. Would you stand up straight on the table and jump?

A. Never paid any attention to that; never grabbed hold of anything; I would step over this bar and go on down in there.

Q. Take hold of the bar and just go down in there?

A. No, I stepped over the bar onto the table and then jumped down in there.

Q. You would step one foot at a time?

A. No, it was——

Q. Could you slide off the table?

A. If you wanted the seat of your pants torn off from bolts or something.

Q. Were there bolts there?

A. Yes, that screwed this steel down to the table.

Q. These bolts stuck up? [169]

A. Well, they are not stuck up above the steel very much, but they have rough spots in them.

Q. You never sat down on the table or got down off the table, other than to just jump down?

A. I just jumped down.

Q. How did you get out of the pit?

A. I just climbed up on the table any way I

(Testimony of Clara Long.)

could get up there, see, and would go over this bar and up the three steps.

Q. In climbing up on the table, did you climb forward or turn around and go backwards?

A. I never go backwards, no; climb up where I could see.

Q. You are tall enough to almost sit there, if you want to. Did you ever sit on that table?

A. No, not on that steel. On one side, there is a place, there is no steel on it. On the left-hand side, there is no steel.

Q. That is the same height as the other, is it not?

A. Yes, it is the same height.

Q. If you wanted to sit, you would sit on the wood instead of the steel?

A. Well, that steel is cold.

Mr. Powers: That is all.

Redirect Examination

By Mr. Sims:

Q. Any steps or ladders that you could have used to ascend from or descend to the floor of this pit?

A. No, never had any since I have been there.

Mr. Sims: That is all.

Mr. Powers: That is all.

(Witness excused.)

The Court: How many more witnesses do you have?

Mr. Sims: I have just one more besides the plaintiff, the plaintiff and one other.

The Court: Put the other one on now. [171]

NORVAL C. HUFSTADER

was thereupon produced as a witness on behalf of the plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. You are Norval C. Hufstader?

A. Yes.

Q. Whereabouts do you live, Mr. Hufstader?

A. Bend, Oregon.

Q. You have lived there for quite a while?

A. About twenty-seven years.

Q. You are married and have a family?

A. Yes.

Q. Are you familiar with the Shevlin-Hixon Box Factory?

A. Yes, I worked there thirteen years, I think.

Q. About how many years?

A. I think thirteen.

Q. There is a photograph, if we may have it; just a small postcard picture of the mill.

A. That is it.

Q. What is the number on the back of that exhibit? A. 15.

(Testimony of Norval C. Hufstader.)

Q. Is that a picture of the mill and of the box factory?

A. Well, it is in there, yes.

Q. Do you know about how many people at the mill? [172]

A. In the mill?

Q. The whole operation there?

A. About 750 or 800, I imagine.

Q. I wonder if you would hand that picture to the jury? I believe the picture is in evidence. If you will hand it to the jury, they can have a bird's-eye view of the operation.

You say you have worked there about thirteen years?

A. Yes.

Q. Were you working there in May, 1943?

A. Yes.

Q. What was your job?

A. I was a cutoff operator, sawyer.

Q. What is a cutoff operator?

Mr. Powers: Everybody knows that, your Honor, I think. I think we are concerned with the accident.

Mr. Sims: It is proper, your Honor.

The Court: Go ahead.

A. I handle lumber and cut it for box stock. My job is to take boards, say, sixteen or twenty feet long, all sizes, sizes shorter than that. I have a saw running back and forth in front of me, and a control bar over here, with stops. I shove my board through the saw and have the stop set at 11½ or 16 or 20 inches long, and the saw cuts it [173] off.

(Testimony of Norval C. Hufstader.)

Then, the saw goes back, and I shove another cut through, 11½ or 12 or whatever it is.

Q. Is the saw moving back and forth automatically? A. Yes.

Q. Were you working at Number 4 or 5 on May 15th when this accident happened?

A. No, I was not.

Q. Was that Ed Leacock?

A. I believe so.

Q. Did you see Galina Smith that night?

A. Yes, sir, I did.

Q. You were working nights then?

A. I was working nights then.

Q. At that time you were working nights yourself? A. Yes.

Q. About how frequently had you been seeing Galina Smith there on the job, or did you notice her at all?

A. Well, I really never noticed her.

Q. On this particular evening, did you have occasion to notice her or see her? A. Oh, yes.

Q. What was that about, Mr. Hufstader?

A. Well, the foreman came to me along early that evening and wanted to know if I had my car and I told him yes, and he wanted to know if I would take a girl to the hospital [174] and I said, "Sure."

Q. Who was that?

A. That was Galina Smith.

Q. Who was the foreman? A. Guy Smith.

Q. They are not related in any way?

(Testimony of Norval C. Hufstader.)

A. Not that I know of.

Q. He just happened to be named Smith?

A. Yes.

Q. Did you observe Galina Smith? How did she look? Was she in pain?

A. Yes. She looked that way to me. I went out and up to my car and I noticed her coming through there. She was limping a little, and so I drove my car down close to the door so she could get in there instead of having to walk clear up on the hill.

Q. How many years had you known her before that?

A. Oh, a year and a half or two, about two years.

Q. To refresh your recollection, at the time this matter was tried before, you said it was about four years.

Mr. Powers: That is leading.

Mr. Sims. It is leading, but I am trying to refresh his recollection.

Mr. Powers: It is immaterial.

A. Four years? Might have been. [175]

Mr. Sims: Q. You think it was a good year and a half you had known her before that accident?

A. Yes.

Q. Had she had any trouble or difficulty with her knee? Was she limping before this accident?

A. I never noticed it.

Q. You saw her working around there. You go ahead and tell us what you did. You said you got your car and drove to the door of the box factory.

(Testimony of Norval C. Hufstader.)

Mr. Powers: That is all leading, your Honor. I object to it.

Mr. Sims: Q. You saw her in pain?

Mr. Powers: Object to that.

A. Yes.

Mr. Powers: He can state what he observed.

Mr. Sims: Q: What did you observe about it?

A. I noticed her limping and, so, I went up and got my car so she would not have to walk up the hill.

Q. What else did you observe about her?

A. On the way to the hospital? Well, every once in a while she would put her hand down here, like that (illustrating) and move it back and forth like that (illustrating).

Q. You took her to what hospital?

A. The Lumbermen's Hospital.

Q. What did you do then when you got there?

A. When we got there, she got out and walked up—stepped inside the hospital.

Q. How long did you stay at the hospital?

A. About a half hour I imagine.

Q. What happened, then? Did you take her back with you?

A. I took her back to work.

Q. Do you know what she did when she—do you know what she did after she got back to the box factory?

A. No, I never noticed.

Q. You don't know where she worked?

A. It is quite a while ago. I don't recollect.

(Testimony of Norval C. Hufstader.)

Q. Do you know whether there were live rolls, power-driven rolls in 3, 4 and 5 at that time?

A. At that time, I don't now remember.

Q. You do not remember? A. No.

Mr. Sims: I think that is all.

Cross Examination

By Mr. Powers:

Q. The fact of the matter is, Mr. Hufstader, that the change of rolls had been gradual?

A. Yes.

Q. Just when that occurred you would not undertake to say?

A. I would not undertake to say. [177]

Q. You say that Mrs. Smith was limping a little and, therefore, you went and got your car so she would not have to walk back?

A. Yes, I went up and brought my car down close to the door.

Q. Did you have to help her in the car or did she get in by herself?

A. She got in by herself.

Q. And to go to the hospital, to get in the hospital, she went in there by herself, did she?

A. Yes.

Q. She was in there about how long?

A. I would say about a half hour.

Q. And you waited for her, did you?

A. Yes, I did.

Q. Then, you brought her back to the mill?

(Testimony of Norval C. Hufstader.)

A. Then, I brought her back to the mill.

Q. Mr. Hufstader, how did the people get down from this table, down to the floor? Did you see them?

A. Yes. They climbed over my—stepped over my control bar, down onto the table and—I stepped into the pit myself; give one long step. They go in in all kinds of ways.

Q. Did you see them stand up and just jump in with both feet, or did you see them work themselves in?

A. Some of them jumped in with both feet. [178]

Q. They could sit down and slide in, could they not? A. They could.

Q. That was done quite frequently, wasn't it, by some of them? A. I don't remember.

Q. You don't know about that? A. No.

Q. About the saws you were operating, before, you said they were just clipping off boards like that (illustrating). Tell the jury about that, how those boards go.

A. They don't drop off that fast. The saw is high (illustrating) and runs back and forth about like that; about that fast (illustrating).

Q. Then, this steel plate on the table, tell us whether there are, in places, screws sticking up out of the plate.

A. There are screws that hold the plate onto the table. Some of the screws are sticking up once in a while.

(Testimony of Norval C. Hufstader.)

Q. But not over on the side where they work and where they slide in? A. Yes.

Q. The table next to it is the same height?

A. I believe they are all the same height.

Q. You could walk from one to the other?

A. No, they couldn't walk from one to the other, I don't think. You mean in the pit? [179]

Q. I mean, the table itself?— The surface of the table. There is one table here (illustrating) that has a steel top? A. Yes.

Q. And then the table next to it has a wooden top, isn't that right? A. Yes.

Q. They are on the same level there?

A. Yes.

Mr. Powers: I believe that is all.

Redirect Examination

By Mr. Sims:

Q. If the bottom of this pit, let us say Number 4, was worn and then later was redecked, how much difference would that make from the top of the table to the floor? In other words, how much build-up would that redecking do?

A. It would be either an inch or an inch and a half, if they put a four-quarter or a six-quarter board in.

Q. Any ladders or steps in there that you could step to? You said you took one long step. Was there a ladder?

A. Not that I know of.

(Testimony of Norval C. Hufstader.)

Q. Could there have been?

A. There wasn't.

Q. Could there have been?

A. I believe it would be in the way of the off-bearer, [180] having to step around her table inside there.

Q. Could there have been and removed by the off-bearer or the punk after she got in there?

A. It might be, yes.

Q. You could step on the ladder or step and then put it away after you got down there, and then reverse the process coming back.

Mr. Powers: He is leading the witness, quite a bit.

Mr. Sims: I think that is all.

Recross Examination

By Mr. Powers:

Q. They couldn't have a ladder attached right there because it would be right where they work and in the way. Isn't that a fact?

A. That would be my idea of it.

Mr. Powers: That is all.

(Witness excused.)

The Court: The jury may be excused until 2:00 o'clock.

(The jury was thereupon excused.)

Mr. Conway: I asked the Clerk as to these X-rays. I asked him as to what X-rays were put in evidence before. We find we have all the X-rays that were introduced before, at the other trial, ex-

cept No. 37. No. 37 was the one that was taken on Monday, I guess, of this week. So, that makes [181] seven X-rays, including everything introduced at the last trial.

I believe there were two other X-rays of the defendant at the other trial, taken by Dr. McClure, and, as I recollect the circumstance here the other day, Mr. Powers and I got all of the X-rays, eight in number, from the Clerk's office before this trial started, and we each signed for them. Then, Mr. Powers took all the X-rays with him. I didn't count our X-rays until they were delivered here to this courtroom at the beginning of this trial yesterday, and the X-rays that I got were only the plaintiff's X-rays which were introduced. I am just explaining to the Court how this circumstance developed, so I cannot account to you for your X-rays, X-rays that belonged to the defendant.

Mr. Powers: Here is what happened. The X-rays were made available to me after the other trial. I think Mr. George came up and got them so Dr. Chuinard would have them. I think we ought to be able to locate them this noon, the other two. But you got the X-rays, or someone from your office got them, to take them to Dr. Chuinard. Mr. George took them down.

Mr. George: I got some.

Mr. Powers: They were all there. I turned over all of them. That is what I undertook to do, so we will have [182] to check up this noon.

Mr. Conway: I imagine we can locate them

somewhere, because I think the Court should have the benefit of all of the X-rays.

Now, I would like to ask permission to amend our allegation in regard to general damages to the extent of \$5,000 more, and then increase the prayer accordingly, if we may be permitted.

Mr. Powers: I object to that at this time. It has been more than three and a half years now since the accident occurred. There would be no basis for an increase at this time.

Mr. Conway: The only answer to that, your Honor, is, if I may suggest, is that there has been a considerable lapse of time since the injury and since the complaint was filed this particular injury has developed into a more extensive injury than was contemplated in the first instance. The history of the case, and the doctor's testimony, shows that situation, and then there is also this other circumstance, your Honor: The dollar is only worth about fifty cents today in comparison to what it was at the time this complaint was filed. I think this matter should be considered in the light of that, should be considered in that connection, and that is the reason I am asking this out of the presence of the jury, your Honor. [183]

Mr. Powers: Dr. Chuinard found exactly the same condition before. His testimony was the same. They have known this all the time. We submit it comes too late at this time that they be allowed to increase the amount of their damages.

Mr. Conway: I don't know what else we could do, as long as we have this situation on our hands.

The Court: What about the point that the medical testimony is identical?

Mr. Conway: What is that?

The Court: What about the statement that your medical testimony is the same as it was before?

Mr. Conway: Dr. Chuinard, as I recall the record, testified to the effect that he felt the movement of this cartilage or some foreign body when he examined the plaintiff on Monday of this week and that he had not noticed before.

The Court: That simplifies it rather than complicates it.

Mr. Conway: In addition to that circumstance, I think he also went into the matter of this exploratory operation, in regard to her knee joint, because of the length of time that this condition has persisted since he saw her before, and he testified a different method of treatment would be required.

Mr. Powers: He said the X-rays showed exactly the same condition, that there had been no increase in roughening, [184] from the way the pictures——

Mr. Conway: We cannot——

The Court: One at a time. We were talking about the medical testimony. Let us settle the medical question, first.

Mr. Conway: I am sorry, your Honor.

The Court: Is his testimony different or is it not different?

Mr. Conway: I tried to explain wherein I

thought it was different. Maybe I am wrong, but that is what I thought it was.

The Court: Is Mr. Powers' statement correct that the X-rays were the same as before?

Mr. Sims: Maybe I could be helpful, since I took the depositions and was in the other trial. Dr. Chuinard's testimony is the same, as far as that is concerned, except that he now feels this foreign body, whatever it is, and feels it is now due to this semilunar cartilage in addition to the foreign body, and that when the operation does occur it should be extensive and an exploratory operation, and Dr. McClure himself testified, of course, the expense of a surgeon and the expense in connection with the hospital at that time would be greater for that type of thing.

The Court: Didn't Dr. Chuinard give the same testimony before? [185]

Mr. Sims: No, your Honor, I don't think so.

The Court: You had better read the testimony, instead of making me read it. You had better make certain of it. I am going to pass on this later.

(Thereupon a recess was taken until 2:00 o'clock p. m.)

(Court reconvened at 2:00 o'clock p. m., pursuant to recess. The following proceedings occurred in the presence of the jury:)

Mr. Conway: Mr. Powers found these X-rays we were talking about.

Mr. Powers: They were here in the papers, among the papers.

Mr. Conway: He has given them to the Clerk. I suppose the Clerk will do whatever is necessary with them. In regard to that other matter we were discussing when we recessed, we withdraw that motion.

The Court: Very well. Let us hurry along now.

Mr. Sims: We will call the plaintiff, your Honor. [186]

GALINA M. SMITH,

the plaintiff herein, was thereupon produced as a witness in her own behalf, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sims:

Q. You are the plaintiff, aren't you?

A. I am.

Q. Whereabouts do you live now?

A. Phoenix, Arizona.

Q. You live at Phoenix, you say, now?

A. Yes, I do.

Q. You are about how old? A. Forty.

Q. Are you married? A. Yes, I am.

Q. What does your family consist of?

A. My husband and my boy.

Q. Your home is where?

A. Phoenix, Arizona.

Q. Are you and your husband working in Phoenix? A. No, my husband is an invalid.

Q. Are you working?

A. Yes, I am working.

(Testimony of Galina M. Smith.)

Q. Getting into the issue here, where were you employed in [187] May, 1943, just prior to May, 1943?

A. I was in Bend, Oregon, at the Shevlin-Hixon Box Factory.

Q. How long did you work there before you got hurt?

A. Around ten months. I am not sure, but I think it was ten months.

Q. Had you been having trouble with your knee before the month of May, 1943? A. No.

Q. What occurred during the month of May? Did your job change in the box factory? Did you get a different job, a different type of work?

A. Yes, sir, I did.

Q. What was it?

A. Well, I went on the high cutoff, the new job I was on.

Q. How was that different than the other work you had been doing for the previous eight or ten months?

A. It was a lot different because it was a different position you had to work in; that is, you had to get into the place in a different manner than the one I had been working in.

Q. In what way was it different?

A. Well, you had to climb stairs and kind of swing over a railing or something of that order—I guess it is called a railing—and jump into the pit.

Q. Was there a pit in the other place you worked in? [188]

(Testimony of Galina M. Smith.)

A. No, there was no pit. It was floor level. You can walk into it.

Q. Who assigned you to that work?

A. The foreman.

Q. The foreman?

A. The foreman, Guy Smith.

Q. Is he related to you? A. No.

Q. Did he direct you in that new job? Did he tell you where to work? A. Yes, he did.

Mr. Powers: It is leading.

Mr. Sims: What is it?

Mr. Powers: It is leading. I would suggest that you let the witness testify.

Q. (By Mr. Sims): What was Mr. Guy Smith's connection with the mill, if you know, the box factory? A. He was the foreman in the mill.

Q. The foreman in charge of what operation?

A. The box factory.

Q. Was he your immediate foreman?

A. Yes.

Q. Who told you where to work and how to get in and out? A. Guy Smith did.

Q. What, if anything, did he say about it? [189]

A. Well, when I went to work there, he showed me how to go about it, and before I got into the place, I asked him how I should get in there and he said, "Yump," so I continued to "Yump."

Q. Did you later, and prior to the 15th of May, discuss with him any difficulties that you felt you were having because of this jumping?

A. I sure did.

(Testimony of Galina M. Smith.)

Q. What did you say and what did he say to you?

A. I felt a drawing or gnawing sensation in my leg.

Q. Which one, or both?

A. The right one, as I climbed in and out of that place; that is, after I jumped in and then after I climbed out again, I could feel that drawing, so I spoke to the foreman about it, and asked him if he couldn't put me on a different job, or he could fix some means by which I could get in there and out of there easier, and he just laughed at me and said, "Oh, that is just old age creeping up on you."

Q. At that time, how old were you? You were three years younger than you now are, is that right?

A. Yes, that is right.

Q. You are forty now?

A. I am forty now.

Q. Was there a step, any step that you might take between the 36-inch level down to the floor? Any stairs in there? [190]

A. There was no stairs in there.

Q. Was there a ladder? A. No ladder.

Q. Would it have been practicable to have had a step or a ladder in there to get in and out?

A. Well, I doubt if you would have had time to have used it before the cutter started to work there.

Q. We have been told about a belt that is in there now that was used to carry away the shook. I am wondering if you could have put a step in there.

(Testimony of Galina M. Smith.)

The Court: That is leading. Don't ask questions that way.

Mr. Sims: Was there a place where you could have put a step to have gotten in and out of the pit?

A. I believe there was, if it could have been pushed back under; that is, if I had the time to push it back out of the way after I got in there before my cutter started to work there.

Q. What do you mean by that?

A. Well, so often, if the cutter was in a hurry to cut that particular amount of work at night, he would have that saw going by the time I would hit the ground or the floor and turn around ready to grab a piece, or to grab boards that would already be coming down. I had to work fast to do that, very fast. [191]

Q. How did that saw move? We have had Mr. Hufstader on the stand. How did it move?

A. It would work back and forth just about like that (illustrating), and each time it went it would cut a slab of wood.

Q. If the sawyer had a board in there——

A. However, I believe they could adjust that, and then they could work faster or slower, as they pleased. I know the cutter I was working with was very fast.

Q. What was the name of the sawyer you were working with? A. Ed Leacock.

Q. Ed Leacock? A. Yes.

Q. Was there lumber brought up to the sawyer,

(Testimony of Galina M. Smith.)

or did he simply work up the lumber that was there, already stacked?

A. I believe he worked up the lumber that was already there and then moved on to the next one.

Q. Where did you start in working that night after you got there, in what pit?

A. Number 3 pit and we moved over to Number 4.

Q. Were you hurt in Number 3?

A. No, Number 4.

Q. What did you do after you completed your work in Number 3?

A. Well, I made the change into Number 4.

Q. How did you get in there?

A. Climbed out of Number 3 pit, walked up the little steps onto the catwalk, down the other three steps, over the railing and, I don't know—kind of a swinging motion to get in there with the railing, I remember that, and then I jumped from that platform on down to the floor.

Q. About how heavy were you at that time? What did you weigh? A. 165.

Q. What do you weigh now?

A. About 130.

Q. What happened, if you know, when you made your last jump down to the floor?

A. Well, I know I had an awful lot of pain when I hit the floor. I didn't know just what had happened.

Q. Where did you have pain?

A. In my right knee.

Q. What did you do then?

(Testimony of Galina M. Smith.)

A. I stood there and cried; it hurt so bad I couldn't do much else.

Q. What did you do? Did you tell anybody?

A. Yes, I called my cutter, the man that I worked with. I called him because he was already cutting there, those pieces of board were coming down, and I couldn't go on working, so I called him and told him I couldn't. [193]

Q. What happened then?

A. He called the foreman.

Q. What foreman? A. Guy Smith.

Q. What did he do?

A. He came and asked me what was wrong and I told him I didn't know, but I had hurt myself, so, then, he turned around and just left me standing there and went over to find somebody to take my place.

Q. He got somebody to take your place before anything was done about you, is that right?

A. Yes, that is right.

Q. What was done to you, if anything?

A. They didn't pay much attention to me right then.

Q. After he got somebody to take your place, what happened?

A. I got out of there as best I could; that is, I held to something. I remember reaching up and getting hold of something and pulling myself out of there as best I could, over the rolls.

Q. Were those rolls power-driven?

(Testimony of Galina M. Smith.)

A. They were power-driven, but at the time they were stopped.

Q. You say they were stopped when you got out?
A. Yes.

Q. What next was done? You say Guy Smith got somebody to take your place? What next happened? [194]

A. Well, I went up to the front of the building maybe—I don't know whether it is called the front or back. Anyway, I went to the nearest point I could go to and waited for him to come. I called him again and told him that it was paining me a lot and asked if he could do something for it and he suggested that Mr. Hufstader take me to the hospital.

Q. Was that done?
A. Yes, it was.

Q. Where did you go?

A. Lumbermen's Hospital.

Q. That is over in Bend, of course?

A. Yes.

Q. Do you know at what time the accident happened?

A. I believe it happened around 7:00 o'clock.

Q. What did you do when you got to the hospital?

A. There was only one nurse on duty. There was no doctor there at the time, and this one nurse took me in and put a lamp over it, you know, for heat.

Q. How long did you stay in the hospital?

A. I don't know the exact time.

(Testimony of Galina M. Smith.)

Q. Your best recollection?

A. I think it was a half hour, but I am not sure.

Q. What did you do after you left?

A. I went back to work at the mill and finished that shift. [195]

Q. Did you go back to Number 4, punking in Number 4?

A. No, I couldn't go back. I couldn't go back—in fact, I couldn't get in there, then, so they put me on the rip saw, in the place I had worked to start with.

Q. Did you get along all right, without any pain or trouble?

A. Oh, no. It pained awfully; in fact, that evening it was very difficult for me to get around and finish.

Q. Did you do your full duty, your full work?

A. No, I had to have help. As a rule, I would help others if they were loaded with shook, and that night I couldn't do that. I had to have someone to help me, because when I would go to push this it would make a strain on that knee and I couldn't do my work, really.

Q. Will you describe how your knee looked?

A. How the knee looked at that time?

Q. Was there any swelling?

A. Yes, it started to swell just a short time afterwards and was very painful.

Q. We have had some testimony read of Dr. Woerner, so we know of course you called him. Do you recall when he saw you, after you got hurt?

(Testimony of Galina M. Smith.)

A. He saw me the next day, Sunday.

Q. The next day?

A. Yes, this was the night of the 15th and 16th, and then [196] it was on the 17th.

Q. You saw him the next day?

A. I called him and he came to my house to see me because I couldn't go to his office.

Q. What was your condition, the condition of your knee then with respect to swelling?

A. Well, it was swollen.

Q. Was there any pain? A. Severe pain.

Q. Did you use your hot water bottle along this period of time?

A. You mean the night I was hurt?

Q. I mean at any time after you first started having this trouble with your knee.

A. Well, I had trouble that night with it, so much so that I asked my foreman, while I was still working, while I was finishing up my shift—I wondered about, when I got home that night, what I would do, so I asked my foreman if he would call my mother-in-law and have her bring a hot pad, a heating pad, to my home so I could use it when I got home that night, and that was what she did.

Q. Was that before or after the accident?

A. That was after the accident. Guy Smith, however, did not call my mother-in-law. He was so busy that he asked Mr. Burhart if he would do it, and he went on out and called [197] my mother-in-law, and she brought up the heating pad that night for me to use.

(Testimony of Galina M. Smith.)

Q. Let's go right along. Did you lose any time after this first hour or half-hour, whatever it was, you lost in the Lumbermen's Hospital the night of the 15th?

A. You mean, did I go right on working the next week?

Q. I want to carry it along in chronological order. What next happened to you?

A. Well, I was off Monday, Tuesday and Wednesday, and then I tried to go back Thursday, Friday and Saturday. I worked three days there, and then I went back on a Monday again and took my lunch and went in, and Mr. Sholes and Guy Smith were talking together as I went in there, and they told me I had better go home, so I did go home.

Q. Who was this that told you to go home?

A. Mr. Sholes and Guy Smith, both.

Q. Is that gentleman, Guy Smith, in the courtroom? A. No, he is not here.

Q. Mr. Sholes is not here?

A. No, Mr. Sholes is not here.

Q. Then, how long did you stay home before you again returned to work?

A. I think it was the next week when I went to the hospital.

Q. How long did you stay in the hospital?

A. Two weeks. [198]

Q. What did they do for you at the hospital?

A. Well, they tried various things. They had my leg elevated and kept me for a while that way. Then, they put heat applications on it from these

(Testimony of Galina M. Smith.)

lamps, and just the sort of thing that they thought would help, but it did not seem to do any good.

Q. After you put in those two weeks at the hospital, did you go back to the same job that you were jumping into, this pit business?

A. No, I didn't go back to the same job.

Q. Did you ever work again in a spot that required you to jump in?

A. No. However, I did go back and try it again. I don't remember the exact date, but I put in about eight days at the mill after that time, on a different job, trying to work again at something different, but I couldn't make it so—I remember the last night I was there, I just couldn't stand it any longer, and I was crying there, and I told the foreman I couldn't, and he said, "Well, if you can't do your work, you had better go home," so I went home. That was the last time.

Q. Then, where did you work, if at all, after you went home? A. I don't quite understand.

Q. I mean, not at the mill; I mean anywhere.

A. Well, the only thing I did then was housework.

Q. About how much had you been making per day at the mill?

A. About 82 cents an hour I was getting when I quit there.

Q. That would figure to how much a day? How much time did you put in a day?

A. It was an eight-hour shift.

(Testimony of Galina M. Smith.)

Q. Did you get extra time for any overtime?

A. Well, time and a half on Saturday.

Q. Time and a half on Saturday?

A. Yes.

Q. What day of the week was May 15th, 1943?

A. That was on a Saturday. That is why I went back and finished the shift.

Q. When you went to work at housework in Bend, how much were you paid?

A. 50 cents an hour, but I couldn't work steady at it.

Q. Why couldn't you work steadily?

A. Because I couldn't stand on the leg that long and do the work.

Q. What was there for you to do? What did you do?

A. It pained and ached so I could not stand it sometimes, after I was on it for a time. It would catch or lock, whatever they call that, so bad sometimes—several times even in the night when I would go to turn over, and if I would be on it very long it would become so tired it bothered [200] me in the night; still troubling sometimes now.

Q. When this knee would pain you, what did you do to relieve it?

A. Well, I would have to sit down and rest and put my foot up on something. I even did that, even when I was working—stop and take a rest. In fact, I had to.

Q. When did you move to Phoenix, Arizona?

(Testimony of Galina M. Smith.)

Just approximately. I don't care for the date exactly.

A. I don't know exactly the date, but it was almost three years ago. Let's see. Wait a minute, now.

Q. This is 1946?

A. It was around Christmas, I believe, in 1944.

Q. You have been there about two years, then?

A. Yes, that is right.

Q. Have you worked there?

A. Yes, I have to work.

Q. What do you do there?

A. I tried various things. I first tried working in a bakery, clerking in a bakery, rather, and then I found I couldn't take the grind of that work in there, so I then went from there down to a variety store and worked there a while, and I had the same trouble there, so then I moved on to that nursing job, the one where I took care of a paralysis patient. I stayed there for fourteen months, because I had a two-hour rest period a day. [201]

Q. You were there for a period of a year, working?

A. Fourteen months I was on that job.

Q. How much did you make while you were there?

A. \$50 a month and room and board for the three of us.

Q. As I understand the situation, you went then to other work, after that, after you had worked there fourteen months? A. Yes, I did.

(Testimony of Galina M. Smith.)

Q. Then, where did you work?

A. We moved to Phoenix, so my boy could go to school. I had to have other employment, so I tried waitress work for a week, and I couldn't take that at all; it was too fast and too hard on the legs.

Q. Whereabouts are you employed now?

A. I am washing dishes in a restaurant there now.

Q. How much are you making there?

A. \$5 a day.

Q. What is the condition of your health particularly now? I don't care about anything else but your knee. Prior to May, what was the condition of your knee prior to that time?

A. My knees were all right up to that time.

Q. Since this accident, has your right knee ever been just absolutely all right?

A. It never has. There is never a day that it does not ache and trouble me.

Q. Is there any period of time when you are entirely free [202] from pain?

A. Well, there are times, if I rest a lot, and am off of my feet, then I don't have pains.

Q. You do feel pretty good when you are not on it, is that right? A. Yes.

Q. Going back into the mill again, how were you dressed? A. In slacks.

Q. You girls all wore slacks? A. Yes.

Q. I think there is no question about this table top. There was a steel covering at Pit Number 4, on the table there? A. Yes.

(Testimony of Galina M. Smith.)

Q. Do you know how that steel plate was covered? Was it attached to the table itself, the wooden part? Was it attached by bolts or screws?

A. I believe—I am not sure whether it was screws or bolts, but it was something of that order that it was attached with.

Q. When you returned to work that night, did the job you took when you came back, after you had been at the hospital, require any jumping at all anywhere? A. No, sir.

Q. About how large is Number 4? Is it just the same size [203] as the others?

A. I think about the same size.

Q. Were you there after a change was made in the rolls and they put in that belt—the putting in of that belt? Did you work there then?

A. No.

Mr. Sims: I think you may cross-examine.

Cross-Examination

By Mr. Powers:

Q. Just a few questions. You had worked at the Shevlin-Hixon Box Factory for, what was it, about nine months, before this accident occurred?

A. Yes, all of that.

Q. In being around the box factory, you saw others get in and out or over this table, did you not, from time to time? A. Yes.

Q. I will ask you how long you worked near one of these tables before this accident occurred?

A. You mean on the cutoff?

Q. Yes.

(Testimony of Galina M. Smith.)

A. I think it was about two weeks after I was on that particular job.

Q. Is it not a fact you were on that job and a good many jobs, and practically every job that a woman could do around the factory—changed from one job to another? [204]

Mr. Sims: That is objected to. I don't see that it makes any difference. It is not proper cross-examination.

The Court: She may answer.

A. What would you like me to answer?

The Court: Ask the question again.

Q. (By Mr. Powers): Is it not a fact that, while you were working there, you changed jobs very frequently and, at your request, were put on several different jobs?

A. It was customary for the girls to change jobs there, because they were supposed to be able to take the places of the men that left to go to war and they were required to change jobs.

Q. I will ask you: Did you not, on numerous occasions, ask for this job or that job, and that any switching around was at your own request?

A. I don't remember ever asking, but I was put on several different jobs there.

Q. I will ask you if it is not a fact that you knew the nature of the work on this cutoff saw and had known it for many months prior to the time you started working on the cutoff?

A. The reason they put me on the high cutoff—

(Testimony of Galina M. Smith.)

Q. I am asking you whether you knew what work there was to be done there, and how you would get in and out? A. Yes. [205]

Q. You knew about that? A. Yes.

Q. I will ask you: Is it not a fact that just two days before this accident occurred, on May 15th, that was when you asked Mr. Smith to put you on this particular job, that you wanted to work there? A. How is that?

Q. I will ask you whether it is not a fact that, a few days before this accident occurred, this incident, rather, on May 15th you requested Mr. Smith, the foreman, that you be put on this particular work? A. No, sir.

Q. That is not a fact? A. No, sir.

Q. I will ask you whether it is not a fact that you had had considerable trouble with your leg prior to May 15, 1943?

A. I had a little trouble with it a few days before that happened. That was because of the climbing out of that place and jumping down in that I had noticed it, and I did have some trouble just a few days before the accident happened.

Q. You kept on jumping anyway?

A. It was required.

Q. I say, you did keep on jumping?

A. Yes, that was a part of the job. [206]

Q. Will you state to the jury whether, in getting down off the table, you assisted yourself with your hands, or if you sat down so you could slide

(Testimony of Galina M. Smith.)

off, the way you usually slide off the table, or whether you jumped off the table?

A. I really don't remember just how I did go about jumping in there.

Q. You don't know whether you assisted yourself into the pit or not?

A. I couldn't say. I really don't remember the way I did jump.

Q. I will ask you whether it is not a fact that, after this incident of May 15th occurred, and you came back from the hospital, in the presence of Guy Smith and Mr. Burhart, Mr. Guy Smith asked you whether you had had any trouble with this knee before, and whether you did not state to him at that time that you had lots of trouble with this knee before?

A. You say that was after the accident?

Q. Yes, some time in May, the night of May 15th, in his office.

A. I was never in his office after that time, because I couldn't climb the steps to go up there.

Q. I will ask you whether it is not a fact that, whereas, most of the girls ran to the rest room, you walked, and when you got in the rest room there was a keg—this was before May 15th—for your use so you could elevate your leg, and [207] whether or not that had been going on for a long period of time before this accident?

A. No, sir. In fact, I don't even remember the keg.

(Testimony of Galina M. Smith.)

Q. Your husband, Mr. Archie Smith, worked at the Shevlin-Hixon mill at this time?

A. He worked there twenty-two years.

Q. He worked there after you left, did he not?

A. No.

Q. He worked after you left for a while, did he not? A. No.

Q. Didn't he work in September, 1943? I don't know. I understood that was about when it was, so whatever your recollection is——

A. Well, now, I can't tell exactly the date on that because it has been a long time. I really can't recall that date.

Q. Is it not a fact that, last October, last year, your husband was employed as a dishwasher at the "Westward Ho" Hotel in Phoenix?

A. Yes, he tried it. He lasted there three days.

Q. I will ask you whether you had not had swelling in this knee before and were required to wear one of these bandages they wrap legs up with?

A. I did wear one of those bandages after the accident occurred, never before.

Q. Never before? [208] A. No.

Q. I will ask you whether or not it is not a fact that, as early as February, 1943, in the presence of your husband and Mrs. Ann Jeffries, or Ann Jeffries, that you complained of your knee at that time, and your husband was trying to keep you from going to work, in your home?

A. I had never complained of that knee up to

(Testimony of Galina M. Smith.)

that time of the accident. I had never had any trouble with it.

Q. The sawyer that night was Mr. Leacock?

A. Yes.

Q. Your attorneys took his deposition over in Bend before the last trial, is that not a fact?

A. That is right.

Q. As I understand it, you had no doctor's care for your knee, other than the X-rays that have been taken since that time, since that incident in 1943 when you went back to the hospital?

A. That is right. I couldn't afford one.

Q. I just asked you the question whether you did have or not? A. I did not.

Q. I will ask you whether it is not a fact that you did apply for insurance benefits, making in your application the statement that this was a non-occupational condition and, as a result thereof, during the time you were off that [209] summer, you received \$180 over a period of about two months?

A. I received something and I did not quite understand just what it was at the time. It was freely offered by the company to me.

Q. You signed an application to get it, did you not?

A. Yes, they had me sign something. They did not give me time to read it.

Mr. Powers: I believe that is all.

Mr. Sims: I think that is all. Thank you.

(Witness excused.)

Mr. Conway: That is our case, your Honor.
(Plaintiff rests.) [210]

DEFENDANT'S TESTIMONY

Mr. Powers: We would like to offer the testimony, your Honor, of Mr. Leacock at this time.

EDWARD LEACOCK

The testimony of Edward Leacock, produced as a witness, by deposition, at the trial October 31, November 1-2, 1944, was thereupon read as follows:

"Direct Examination

"Q. Your name is Edward Leacock?

"A. Edward Leacock.

"Q. About how old are you now?

"A. I will be 51 in August, the 13th day of August.

"Q. You are just a kid like the rest of us?

"A. Yes.

"Q. You work whereabouts?

"A. Shevlin's Box Factory.

"Q. How long have you worked there?

"A. Well, sir, I will tell you fellows,—I have worked there ever since 1918, off and on. I left a couple of times but most of the time I have never worked anywhere else since I have been in Bend.

"Q. You have been working there continuously for the last eight or nine years?

"A. Yes; seven years the last time.

"Q. You were working there when this lady had trouble with [211] this knee and went to the hospital, I assume. A. Yes.

(Testimony of Edward Leacock.)

“Q. That is the incident that Norval just testified about? A. Yes.

“Q. And you remember the date?

“A. Well not exactly I don’t, but I think it was in May.

“Q. The hospital records here indicate she reported that she got hurt the night, I believe, of May 15th, or morning of May 16th, whenever that was?

“A. Must have been May 15th or May 16th——

“Q. Yes.

“A. (Continuing): ——because we was working nights.

“Q. Who worked with her?

“A. I was working with her.

“Q. Keep any records of which saw you are working on, whether 1 or 9?

“A. When I go to work of a night I generally got orders from the foreman, and he tells me what machines to run,—if it is 1, 2, 3 or 4—I am head sawyer, and he generally tells me which to go up on first.

“Q. Those are just verbal orders? He tells you where to go? A. Yes.

“Q. He will say, ‘Ed, take Number 3 and run off 8-inch stuff,’ whatever it is?

“A. He tells me to take this machine, cut it down so far, and [212] then I move to the next machine. That is the way we work at nights. We cut down for the day shifts.

“Q. You work in a series of spots?

“A. Yes.

(Testimony of Edward Leacock.)

“Q. And as you move, the punk moves with you?

“A. Right.

“Q. How do the punks get in and out of the pits?

“A. Well, I’ll tell you—May 15th, that night, he put me on Number 4——

“Q. I wasn’t asking about any particular time. I am just asking the question—back in May how did the punks get in and out?

“A. Now listen; there is two ways to come in that machine. One way up the rolls and one way to crawl underneath these rolls.

“Q. What held the rolls off the floor?

“A. These here, up on the stencils, braced.

“Q. Sure they were braced? A. Sure.

“Q. Did you ever go in and out under the rolls?

“A. Yes.

“Q. That was the usual way you did it?

“A. No, I didn’t generally do that. I went up the stairs, and down to my saw.

“Q. That was the safe way to do it? [213]

“A. That was the safe way to do it.

“Q. And, as a matter of fact, that is the reason they have that catwalk above you, to get in and out?

“A. Yes.

“Q. No other reason for it to be there; is that right?

“Q. (By Mr. Sims): When is the first time I ever saw you, Ed?

“A. The first time was here, today.

“Q. (By Mr. Sims): To back into this catwalk

(Testimony of Edward Leacock.)

thing,—the reason for the catwalk being there is to provide safe means for you to get to your stalls? That is right, isn't it? A. Well, yes.

“Q. Sure. There couldn't be any argument about that. And when these punks get down into this pit, back down to the ground floor, they use the catwalk and step over your saw and down on the shelf and jump to the floor? Is that right? Now how do they do it? I'll just turn you 'loose.

“A. On Number 4 they had a way they could come in these rolls and walk in to these saws, or she could have went underneath instead of that; I was cutting on Number 4 and I had about half an hour time. Before, Mrs. Smith got a little bit sick. She got a kind of feverish spell and asked me for a drink of water. I didn't have no way to get her any water so Smith come along and got her drink of water out of a cork bottle. After that she was all right. We finished that out in about half an hour. Then I moved over to Number [214] 5; well, she climbed over the top of this gauge and stood on top of the table, which was as big as that (indicating a table in courtroom); seemed to be all right. I was oiling up. She had anyway five minutes and was sitting on top of this table, which she only had about a foot to slide off to stand on her feet, and when I got ready I said 'Ready for your lineup?' She had already slid down off this table which wasn't only about that high (indicating), I should judge.

“Q. The witness is indicating about—do that again, Ed, will you?

(Testimony of Edward Leacock.)

“A. I should say about (indicating).

“Q. A couple of feet? A. Oh, no.

“Q. Twenty inches? A. Twenty inches.

“Q. All right, twenty inches.

“A. And she slid down in there, and I asked if she was ready for her lineups, for her marks for the different grades. Mrs. Smith told me, to hell with the lineup. She said she had hurt her knee.

“Q. Let me interrupt you. Was she in pain, apparently?

“A. She didn't seem to be, no, sir.

“Q. Looked like she was feeling just fine.

“A. Looked like she was feeling all right. [215]

“Q. Didn't cry or anything?

“A. No, she didn't cry; so I said to her, 'Are you ready for your lineup?' She said, 'To hell with the lineup, I have hurt my knee.'

“Q. Yes.

“A. So she asked me to help her, and I didn't, because I was busy with my lineup, and Smith came along——

“Q. Your foreman?

“A. Yes, Smith is the foreman; and she went out under the rolls, underneath, stooped over and went out underneath, and Smith took her up to the office and then I was through.

“Q. Did you see the witness Hufstader, whatever his name is, leave with her?

“A. No, I didn't; I was busy; I was—but I seen her when she came back. Mr. Smith came back from the hospital, and I guess they were gone an hour

(Testimony of Edward Leacock.)

or something like that, I can't say, but she finished her shift out that night on a different job; so that is all I could tell about that.

“Q. Did you ever make a written report of this accident to anybody? A. No, never did.

“Q. Did the general plant manager, Mr. Myers, call you in to talk to you? A. No.

“Q. Did you go in and talk to Mr. Myers? [216]

“A. No.

“Q. You didn't see him Saturday?

“A. I never seen nobody, until I got my subpoena.

“Q. Then what did you do?

“A. Well, let's see, that was Saturday night when I was ready to go to work; and Mr. McCauley drove up and said, 'I want to see you, Ed.' I said, 'Okay.' I got in the back end of the car and he showed me the subpoena he got. Also give me \$2.10. I said 'I should worry about the \$2.10. I don't need it.' He said, 'Well, this is a subpoena, Ed.' So I went over and worked until 9 o'clock and I had worked a double shift already, and come home at 9 o'clock and went to bed.

“Q. You have never talked to anybody about this? A. No.

“Never did to anybody?

“A. Nobody except,—well, I'll tell you. I guess about three weeks ago the foreman did come tell me Mrs. Smith sued the company, but I didn't think it had or I had anything to do with it, or anybody else. It wasn't my business.

(Testimony of Edward Leacock.)

“Q. You didn’t feel like you had hurt her any, did you, Ed? A. No.

“Q. When did you talk to Mr. Veazie about this?

“A. Let’s see; it was this afternoon right here, wasn’t it?

“Q. What is your best recollection? He will tell you, no [217] doubt, but what is your recollection of when you talked to him?

“A. It was right here in the courtroom this afternoon, wasn’t it?

“Mr. Veazie: Use your own recollection. Don’t you remember talking with me and Mr. Myers on Saturday? A. Oh, yes, we did.

“Q. (By Mr. Sims): What time did you talk to him Saturday?

“A. Well, let’s see, it was about two o’clock Saturday.

“Q. You had forgotten a moment ago that you had talked to Mr. Myers and Mr. Veazie?

“A. Yes.

“Q. You just overlooked that?

“A. Yes, I just overlooked that.

“Q. Think you might also have forgotten about how Galina Smith got in and out of that pit that night? A. No.

“Q. How does it happen your recollection of this transaction a year ago of how she sat down and very gently got onto this pit is so clear, and vivid, but even last Saturday’s transaction is obliterated, and Mr. Veazie had to refresh your memory? Why is that?

(Testimony of Edward Leacock.)

“A. Well, I have to change these machines every night.

“Q. Yes.

“A. And I have my lady partners with me all the time, and [218] Mrs. Smith was practically the only lady that ever got hurt. She claims she got hurt.

“Q. Yes.

“A. And my other ladies get in and out or crawl underneath or crawl up on top and don't seem to be bothered.

“Q. That still don't explain how you remember what happened a year ago so much better than what happened Saturday.

“A. Well, I could remember that as well as going to work.

“Q. As a matter of fact, you were busy with the saw getting ready to go to work? A. Yes.

“Q. You were not standing there watching what she was doing? A. Well, yes, I'll tell you——

“Q. (Interrupting): You don't know whether——

“Mr. Veazie (Interrupting): Let him answer the question.

“A. No; as I told you before, she climbed over the stop and stood on top of the table.

“Q. Yes.

“A. And set down there, because I had five minutes to oil up.

“Q. To refresh your recollection, isn't it true she jumped down, and hurt her knee, and sat down;

(Testimony of Edward Leacock.)

and that is when she said, 'I am hurt and I can't work.'

"A. She didn't tell me that. My gosh! She just slid off [219] the table and she didn't have twenty inches——

"Q. Yes.

"A. ——there; and she claims that—Well, then, she felt of her knee, and I got my lineup and was asking her ready for her lineup when she says, 'To hell with the lineup. I hurt my knee.' I said—well, just like before, Smith come along, and she crawled underneath the rolls and went with Smith, and I never seen her any more only after she come back from the hospital.

"Q. You say she didn't have to crawl underneath, she could have walked out of there?

"A. She could have walked between the other rolls, if she wanted to, but climbed underneath to get out. Smith told her to come out and he would take her to the hospital.

"Q. The witness we just had testified the rolls were up against that.

"A. They are different then, now.

"Q. I know you have it fixed now so this wouldn't happen.

"A. But these rolls were—We had enough for me or you or anybody else to walk up between Number 5 and 6 cutter saw, either that or you could climb underneath.

"Q. Yes.

"A. Or overhead, and step on your table.

(Testimony of Edward Leacock.)

“Q. Why would people go in and jump three feet to the floor when they could walk right in?

“A. I don’t understand it, either.

“Q. Was that a company instruction, they should do that to see how active they were, or something?

“A. It was just what way she wanted to do it.

“Q. There was no bench to step off the work-bench or shelf down to the floor?

“A. No, there could not be; it fastens right here and our table is along here.

“Q. Why do you say there couldn’t be when, as a matter of fact there is such a bench in quite a few of those pits, or was—isn’t that true?

“A. There has never been no benches that I know of where a woman would be sitting on this table and put her foot on the bench.

“Q. Forget about sitting on the table; there is a bench it is possible to step on all the way down to the floor, they come up over your saw?

“A. Yes, but she wouldn’t have done that.

“Q. I know, but why did you say a moment ago there could not be when there is.

“A. There wouldn’t be in the way of her working there.

“Q. In a number of these pits there is such a bench, isn’t there? A. No.

“Q. Never was such a bench in any of the nine pits? [221]

“A. Never was in any of them where a woman could sit down.

“Q. Forget about this woman business, forget

(Testimony of Edward Leacock.)

about the punks entirely. In some of these pits was a bench that anybody getting in and out of the pit could have stepped on, isn't that true?

"A. Listen——

"Q. (Interrupting) Answer 'Yes' or 'No', please. A. I will say 'No.'

"Q. There never has been a bench in any of those pits? A. No.

"Q. And there couldn't be?

"A. No, couldn't be.

"Q. Couldn't be anything of that kind? So that any witness that testified, like Mr. Schueler, or any of those gentlemen who testified there was such a bench in some of those pits would just simply not be telling a fact, is that right?

"A. That is right.

"Q. Did you testify that you got Smith to come and get her after she got hurt?

"A. After she——

"Q. Yes, when she said—whatever this expression was—that her knee hurt and she wasn't going to worry about the lineup, you told Smith about this? A. Smith was coming up there.

"Q. Then you waved him over? [222]

"A. Waved him over and told him to take her.

"Q. Whereabouts had you been working before you went to work in Number 4 that night?

"A. I wasn't working at no other place.

"Q. That is where you started?

"A. That is where I started.

(Testimony of Edward Leacock.)

“Q. About how long would it take you to change saws from four to five?

“A. About every two hours.

“Q. You change about every two hours?

“A. Well, yes; it is just according to how my lumber is piled up; maybe takes me three hours; maybe four hours.

“Q. Did she ever complain to you that her knee was hurt before this time?

“A. No, she never did.

“Q. That is the first time she ever said her knee was bad?

“A. Yes; but I know in Number 4 several times that she had kind of a little fainting spell, feverish, hot, and wanted water, and I wasn't able to go get water right then and I told her to go get it herself. Smith got her water this night. So the next—after we moved over to Number 5 why she was all right. Seemed to be all right, until she slid down into the pit.

“Q. Until she jumped into the pit?

“A. She didn't jump down, slid off onto the floor. [223]

“Q. Were you just standing there watching how she was—

“A. (Interrupting) Yes, I had my lineup there.

“Q. Then did you make a practice of watching how the punks got in?

“A. Yes; the foreman tells me to watch them pretty well around the saws.

(Testimony of Edward Leacock.)

“Q. Do they quite often get hurt jumping into the pit? A. Never have.

“Q. This is the first time; but now there is a change so the rolls don’t enclose the pit?

“A. What?

“Q. They have been taken out entirely, haven’t they? A. No——

“Q. But that is changed?

“A. No, they are there yet.

“Q. Behind the pit? A. Yes.

“Q. Just like it was? A. Yes.

“Q. Haven’t changed?

“A. There is a change, too.

“Q. But the rolls are still there? A. Yes.

“Q. And all your testimony would be just as accurate as that statement? In other words, if you are wrong about the [224] rolls you are about the other statements you have made?

“A. No, I can’t be wrong about her getting down to the floor.

“Q. You couldn’t be mistaken about the rolls being there? A. The rolls are there.

“Q. I was there this morning and they were not there. A. They aren’t?

“Q. No.

“A. Maybe they have been changed since Monday.

“Q. Maybe there have been changes?

“A. I don’t know; I’ll tell you—I didn’t work Saturday night, and I understand the construction crew was going to change the rolls. Maybe they

(Testimony of Edward Leacock.)

did. I don't know. I haven't been over there, but the last time I was there was Friday night until 1:30 and then them rolls was behind there, where they put their cuts on and they go on down and out, but there may be a chance the construction crew come along and changed them since I was there.

"Q. You haven't seen this live belt under the bench at all? A. No, I haven't.

"Q. But you do remember now you did talk to Mr. Myers and Mr. Veazie Saturday about this case? A. Yes.

"Q. And you had forgotten that when you first started to testify? [225] A. Yes.

"Q. But did they go over the answers about this business of her sitting down and getting in there—did you go over that with Mr. Myers?

"A. No.

"Q. Didn't tell Mr. Myers about that?

"A. I did, I told him just what I knew about it, and what I am telling you here now.

"Q. You told them about her sitting down and getting in easy like? A. Yes.

"Q. So you didn't understand about how she did break this cartilage of this knee?

"A. I didn't understand why she did that?

"Q. How did she get in there the first time, in this pit Number 4?

"A. When we first started work?

"Q. Yes.

"A. She went underneath.

(Testimony of Edward Leacock.)

“Q. She usually went in underneath the rolls?

“A. Yes.

“Q. What holds the rolls off the floor?

“A. On the frames.

“Q. How close are the frames?

“A. Three or four feet. [226]

“Q. Quite a ways apart?

“A. Quite a ways apart.

“Q. How high are the rolls above the floor?

“A. That high. (Indicating).

“Q. About twenty inches? A. Oh, 30.

“Q. You are indicating what you did for the bench, above the floor?

“A. Our bench and them are practically even.

“Q. Why is it, when you are having her get off the bench onto the floor you say it is twenty inches, but when you want a place for her to get under the rolls into the pit you boost it and make it thirty or forty inches?

“Q. Why do you do that? A. What?

“Q. You say the bench and the rolls are the same level?

“A. Well, they practically are.

“Q. Yet you testified this bench she got off of onto the pit was about twenty inches? And the rolls she was supposed to go under was about thirty inches. A. You got me wrong.

“Q. Yes, obviously. Straighten me out.

“A. This bench and rolls is practically the same, about 30 inches.

“Q. Yes. [227]

(Testimony of Edward Leacock.)

“A. But when she was sitting on the table where she had to slide off she wouldn’t have over twenty inches to step down on the floor.

“Q. I see; the 20 inches was from her feet to the floor? A. Yes.

“Q. She is pretty short-legged, isn’t she?

“A. Not so bad.

“Q. Ed, how many times did you get in and out of Number 4 that night, before this accident?

“A. Me?

“Q. Yes.

“A. Well, I’ll tell you; I generally work about an hour or an hour and a half without moving, without going after a drink of water, or anything.

“Q. Well, make it an hour; how many times had you changed before this accident?

“A. Just once.

“Q. Just once?

“A. Just once, from 4 to 5.

“Q. So this punk had just been in there one other time that night, in four, then in five, and back to four? A. No.

“Q. All right; how many times?

“A. I moved from Number 4 to Number 5. I never go back.

“Q. I see. [228]

“A. And I was moving from Number 4 to Number 5, and it is generally about five minutes to oil up and get ready.

“Q. Yes.

“A. She was sitting on the table when she kind

(Testimony of Edward Leacock.)

of slid off on the floor and claims she hurt her knee, and she asked me to help her, and Smith come up. He took care of her and this gentleman over there took her to the hospital and I didn't see her until she came back from the hospital and worked the rest of her shift out.

“Q. How long, ordinarily, does it take you to change saws—about five minutes? A. Oiling?

“Q. No, how much time from the time you quit at 4 and start at 5?

“A. A fellow can use his own judgment.

“Q. How much, ordinarily?

“A. I would say five minutes.

“Q. And in that five minutes she has to get out of the pit, no matter how she does it, and be ready to go?

“A. Yes. In other words, we give the punks their time about that, us fellows do, the sawyers.

“Q. How many sawyers were on the job that night, Ed? A. Two.

“Q. You had the first five and Hufstader the next five? A. Yes, wasn't that right? [229]

“Q. How many punks that night?

“A. Lady punks?

“Q. Yes.

“A. One for me and one for him.

“Q. Just two on the night shift?

“A. Yes, but then if one of the punks gets sick we can always get another one.

“Q. Where do you go to get the other one?

“A. Ask the foreman.

(Testimony of Edward Leacock.)

“Q. He is there to provide you with lady punks?

“A. Yes.

“Cross Examination

“By Mr. Veazie:

“Q. You haven’t been over to the shop today, have you, Mr. Leacock?

“A. No, I haven’t; I haven’t been over since Saturday, or since Friday night.

“Q. You wouldn’t know anything about any changes that have taken place since Friday night?

“A. Well, I’ll tell you, Sholes, the superintendent come to me Friday night. Generally on the cleanup I clean up every other Friday night for four hours. He told me to clean up Friday night because the construction crew was coming along and change these rolls and belts, and I don’t know how they have them changed. I haven’t been over there since. [230]

“Q. About these benches, you have said that there was no bench that stood where a woman could step off the table or platform onto the bench, that is to say—if the bench was in front of the table where she worked, it would be in her way, wouldn’t it?
A. Yes.

“Q. Were there benches in those places where the punk stands?

“A. In some that are to pile stuff on, but they are out of the road where she stands.

“Q. Movable benches? A. Yes.

“Q. They can be put where you want them?

“A. Yes.

(Testimony of Edward Leacock.)

“Q. But they are not left in front of the tables for the purpose of being stepped on?

“A. No.

“Q. That is what I understood you to mean. Previous to the night of the 15th of May you had said that on that evening she had complained about feeling pains or something of the kind?

“A. Yes.

“Q. Had she ever complained to you before about her health or any trouble she had?

“A. Well, no, she never did; only except that night that she got a little feverish and she wanted a drink of water. [231]

“Q. How long had she been working with you as a punk? A. About a month.

“Q. And she hadn't complained during any of those times? You heard something about the—you say Number 4 they could come in between the rolls. I wish you would explain that a little further.

“A. You mean to come into Number 4 or Number 5 or 6?

“Q. Yes.

“A. The same—the way to come into them rolls?

“Q. The way you said that anyone could come in between the rolls?

“A. At that time you could come up these rolls from back down on the floor, away back from where the lumber goes to be piled on the trucks—come up them and into 5 and 6, either that or you could go underneath this roll.

“Q. Yes. A. You could go underneath.

(Testimony of Edward Leacock.)

“Q. As I understand it, there were two sets of rolls, and the space in between them was such that anyone could walk in between them?

“A. Yes.

“Q. And then there was, according to what you said a while ago, enough space under the rolls so that anyone who wanted to crawl under, could?

“A. Yes. [232]

“Q. And you could go up on the catwalk and come in that way? A. You can, too, yes.

“Q. Are the punks told which way they should go, or left to do as they please?

“A. They can go as they please.

“Mr. Sims: Object, and move it be stricken; it calls for a conclusion; how would he know?

“Q. You say they are not told. You didn’t undertake to tell them? A. No.

“Q. What ways do the punks ordinarily get in, or do they have any regular way? What is their custom?

“A. Well, they can go underneath these there rolls or up the steps, same as I do, and climb over and stand on the table and down onto the floor.

“Q. Yes.

“A. I have a lady, been working with me about four months, and that is the way she does—comes up the steps with me, and slides over the steps, onto the table, and slides to the floor.

“Q. As far as you are concerned, you are working clear above the table? The place you stand is about on a level with that table, is it not?

(Testimony of Edward Leacock.)

“A. No, I am up higher. I am a sawyer; I am back.

“Q. The place where you stand is higher than the table we [233] are talking about where Galina Smith sat down and slid off? A. Yes.

“Q. So, in going to your place of work you naturally go up the catwalk? A. Yes.

“Q. And it is the same thing with the other sawyers, is it not, that they use the catwalk practically always to get to their place of work?

“A. Yes.

“Q. Did you see anything of Galina Smith—well, she came back and worked the rest of that shift, but she worked on a different job; I understand you didn’t see her again that night?

“A. That night?

“Q. Did you see her afterwards?

“A. I seen her at the hospital once. I just stopped in, I wanted some medicine for himself and stopped in, but she was getting ready to go home.

“Q. Aside from that——

“A. What?

“Q. Have you seen her about, on the streets or anywhere?

“A. I met her one time downtown here about over a month ago, maybe not that long, and I asked her if she was working, and she said ‘No, you know I can’t work. I hurt my knee.’ I had forgotten all about that. [234]

“Q. Did you observe her at that time, to see whether she seemed to be lame or not?

“A. Well, I couldn’t say.

(Testimony of Edward Leacock.)

“Q. Did any of the punks ever climb in over the rolls?

“A. Ever climb in over the rolls?

“Q. Yes.

“A. No, they never did; they couldn't climb over those; these rolls are live rolls, see; and I had a boy one time working for me—that was before any of the ladies worked with me, and he used to fool with these rolls with his hands, and got his hand caught there. Finally we got it out; it didn't hurt it much. Then the millwrights put up a safety board across the whole rollers in front where they turn around to put these boards on. The board is fastened around over the rolls and down at the floor, so they cannot climb over.

“Mr. Veazie: I think that is all.

“Redirect Examination

“By Mr. Sims:

“Q. Ed, you say there was a board put in there by the safety boys so that there was a board between the place where these lady punks work and the rolls; did you mean that?

“A. Well, I'll tell you——

“Q. First tell me yes or no. Do you mean there was a board put in there?

“A. There was a board put in there. [235]

“Mr. Sims: That is all.

“Recross Examination

“By Mr. Veazie:

“Q. Describe what the board was—where it was and how it was.

(Testimony of Edward Leacock.)

“A. It was after this boy working with me had hurt his hand, the foreman put these boards in here so they couldn’t put their hands underneath the belt or underneath or fool with the belt at all.

“Q. How far down—where was the top of that board and where did the bottom of it come?

“A. This board would reach from the top of the table to about there (indicating).

“Mr. Sims: The witness is indicating a distance—how far from the floor?

“The Witness: Twelve to fourteen inches.

“Q. (By Mr. Veazie): Did that board extend clear across?

“A. No, it didn’t, it left room for the punk to crawl underneath the roll, or underneath.

“Q. The board didn’t block the passer, under the rolls?

“A. No, he could crawl under here or over here; this board was only about that wide. She could crawl over here or over here (illustrating).

“Mr. Veazie: That is all. [236]

“Redirect Examination

“By Mr. Sims:

“Q. You say she would have four or five inches at either end to crawl in?

“A. More than that.

“Q. What time did you come to work that night, Ed, the night of this accident?

“A. Five o’clock.

(Testimony of Edward Leacock.)

“Q. You worked whereabouts when you came to work? A. What?

“Q. What spot did you work in?

“A. Number 4.

“Q. How long did you work there?

“A. I worked there until about 7 o'clock.

“Q. You worked three hours straight in Number 4? A. No.

“Q. All right; where did you work?

“A. It wasn't three hours.

“Q. All right, how long did you work?

“A. Two hours.

“Q. All right, you worked two hours in 4, then where did you go? A. Number 5.

“Q. Who was the lady punk in 4 when you started work? A. Mrs. Smith. [237]

“Q. How did she get into 4 pit?

“A. The first time she come underneath these rolls.

“Q. How did she get out of there?

“A. When she got ready to go out she could go——

“Q. (Interrupting) How did she go out, do you know? A. When she got hurt?

“Q. No; how did she get out there the first time?

“A. Well, she got up on the table.

“Q. Yes.

“A. And come up the top of my gauge.

“Q. And then up the catwalk? A. Yes.

“Q. Then how did she get into Number 5?

(Testimony of Edward Leacock.)

“A. When I changed saws to go into Number 5 we done the same thing, come up the catwalk and got over on the table.

“Q. Jumped down into the pit?

“A. She didn’t jump down into the pit.

“Q. She got into the pit?

“A. She got into the pit.

“Q. Then how did she get out of Number 5?

“A. She went out underneath the rolls.

“Q. Crawled underneath the rolls?

“A. Yes, when Smith come out she crawled out underneath the rolls.

“Q. You wrote all this down? [238]

“A. No, I didn’t.

“Q. How do you remember it so good?

“A. That is easy to remember, man.

“Q. I know, but how do you remember that particular thing so clearly, but when you saw her down the street a few days ago you had forgotten there was such an accident?

“A. She thought her leg then was better.

“Q. How many times has the superintendent of this mill called you in and had a conference about this? A. The superintendent?

“Q. Yes, Mr. Myers? A. Just once.

“Q. Just once. Thank you, that is all.

“(Witness excused.)”

Mr. Powers: Guy Smith’s deposition was likewise taken at Bend. We would like to offer it at this time. I think we ought to state to the jury

when and where these depositions were all taken. They were taken at Bend, but I don't know just when—1944, in April. [239]

The deposition of

GUY A. SMITH,

a witness on behalf of the defendant, was then read as follows:

“Direct Examination

“Q. Mr. Smith, how long have you been employed by the Shevlin-Hixon Company?

“A. Approximately twenty-five years.

“Q. Has that been continuous?

“A. I have been there eighteen years continuously.

“Q. About how old are you now?

“A. Forty-one.

“Q. You are married and have a family?

“A. I am married.

“Q. No children? A. No children.

“Q. What are your duties at Shevlin-Hixon?

“A. Foreman.

“Q. As foreman what are your duties?

“A. I supervise the running of the box factory.

“Q. You are acquainted with Galina Smith?

“A. Yes.

“Q. Was she employed there in May, '43?

“A. Yes.

“Q. Did you see her at the time of the injury?

“A. Yes, I saw her right after.

“Q. Was she in apparent pain at the time?

“A. She was limping some.

(Deposition of Guy A. Smith.)

“Q. Who did you send her to the hospital with?

“A. Norval Hufstader.

“Q. At that time do you know which spot she had been working?

“A. She was working on Number 5 cutoff.

“Q. Did you see her at work? A. Yes.

“Q. Did you make any written record of where she was working?

“A. No, I didn't make no record of it.

“Q. That is just a matter of memory then?

“A. Yes.

“Q. Who was she working with?

“A. Ed Leacock.

“Q. Had you instructed the lady how to get in and out there?

“A. No, I never instructed her; as a matter of judgment she had two or three different ways of getting in.

“Q. Had you ever told her the way to get in was to step in and jump to the floor? A. No.

“Q. Had you broken her in on the job?

“A. Yes.

“Q. Did she ask you how to get in?

“A. No.

“Q. Did you tell her ‘just jump’? [241]

“A. No.

“Q. As I understand, you don't think she got hurt? A. No.

“Q. Don't you think anything is the matter with the knee?

“A. I wouldn't say that; she might have some-

(Deposition of Guy A. Smith.)

thing wrong with her knee, but I don't think she injured it over there.

"Mr. Sims: That is all.

"Cross-Examination

"By Mr. Veazie:

"Q. You were called after she complained her knee was hurt,—you were called by Mr. Leacock, or somebody? A. Yes.

"Q. Did you go where she was?

"A. She came over where I was.

"Q. Then you arranged to have Norval Hufstader take her to the hospital? A. Yes.

"Q. What different ways were there of getting into that Number 5 saw, the place where the punk stands?

"A. There was, I would say, three different ways: You could go over the top and down on the table and then slide down on the floor level, or go under the belt, or have went between two rolls from Number 5 cutoff and walk right straight to her position.

"Q. Did you ever indicate to her in any way—Suppose she [242] went up to your catwalk and came over the railing onto the table—did you ever tell her, or indicate how she should get from the table to the floor?

"A. No, I never did advise her how to get in there.

"Q. What is the height of the table above the place where she stood?

(Deposition of Guy A. Smith.)

“A. It is approximately thirty-three inches from the table top to the floor.

“Q. And the rolls are about the same height, I believe?

“A. The rolls, I would say, are maybe a little lower, maybe approximately that height, yes.

“Q. Had Galina Smith ever conveyed to you, before the 15th of May, 1943, about trouble with her knee?

“A. She had complained about her side, her whole side; she complained one night; she thought possibly she had a stroke over there.

“Q. Well, did she or did she not, ever speak particularly of having trouble with her leg or with her knee?

“A. No, she never really mentioned her knee before that time.

“Q. But after the accident did she discuss that subject with you, the question whether she had had previous trouble with the knee?

“A. Yes, when she came back from the hospital I asked her if she ever had trouble with the knee before; and she said yes, considerable trouble. [243]

“Q. Did she say when and where that trouble had occurred?

“A. No, she didn't tell me anything about that; she called it a trick knee, is what she told me.

“Q. Did she say anything about where she had previously lived? A. No.

“Q. Or where she might have gotten this knee trouble? A. No, never told me that.

(Deposition of Guy A. Smith.)

“Q. Had she ever complained—you say she spoke, I believe, something about, like a numbness in her side, before the accident occurred?

“A. Yes.

“Q. Did you ever hear of any previous complaints about her health?

“A. Well, she said a few times she didn’t feel good, said she felt faint a lot of times.

“Q. Do you remember how long she had been on that particular job as a punk?

“A. No, I don’t remember just how long she was on there.

“Q. How many jobs had she had in the factory?

“Mr. Sims: Objected to; it doesn’t make any difference.

“A. Oh, I would say possibly four, before that.

“Q. The other witnesses have indicated she came back the night of the 15th of May and finished the shift. That is correct, is it? [244]

“A. Yes.

“Q. What job did you put her on?

“A. On the resaw.

“Q. Did she seem able to perform that work all right? A. Yes.

“Q. When she was—Then she came back again to work for a while in August, I believe.

“A. Yes.

“Q. What was her job then?

“A. She was off-bearing and resaw at that time.

“Q. How long did she work that time in the box factory?

(Deposition of Guy A. Smith.)

“A. I would say possibly a little over a week, maybe eight days or so, I don’t remember exactly.

“Q. What appeared to be her physical condition at that time?

“A. Seemed to be able to work all right, never complained about her knee.

“Q. Show any signs of lameness?

“A. Not a bit.

“Mr. Veazie: That is all.

“Redirect Examination

“By Mr. Sims:

“Q. You remember the time she complained about her knee, she said, ‘Can’t you fix some kind of a step or some way you can get in and get out of the pits without jumping?’

“A. I don’t remember her ever saying anything like that. [245]

“Q. You would not say she didn’t?

“A. I don’t think she said it.

“Q. Are you in considerable pain?

“A. Well, I am uncomfortable.

“Q. Just do the best you can. She seemed to be quite sure she had discussed that, and I wondered if you wanted to be that definite.

“A. I just don’t remember anything about it.

“Q. You don’t just recall?

“A. No, I don’t.

“Q. You could not be mistaken?

“A. I won’t say she did not say it; I don’t remember it.

(Deposition of Guy A. Smith.)

“Q. This Number 5 place—there is testimony it was in 3 and in 4. There is no testimony from any witness that it was in 5—

“Q. How do you fix 5 instead of Number 3, 6, 4 or 1? A. How do you mean I ‘fix’?

“Q. How are you so positive it was 5?

“A. I recall the night it happened, it was 5.

“Q. You did not see her in the pit?

“A. No, but I ordered her to go there; she worked in Number 4 before and she worked in 5.

“Q. The same night? A. Yes.

“Q. You specify where she was to work? [246]

“A. Yes.

“Q. And not Ed Leacock?

“A. I tell Leacock; I don’t tell her.

“Q. Then you didn’t really mean what you said when you said you told her yourself?

“A. No, I don’t tell her; I tell him.

“Q. You made no record of this, didn’t write it down? A. No.

“Q. Didn’t report to anybody of it?

“A. No.

“Q. You didn’t make any record of the fact that she got hurt at that particular time?

“A. I usually make a record of things like that, but didn’t on that night, because I didn’t think it was very serious.

“Q. Since you decided there was nothing the matter with her you didn’t pay any particular attention to it?

“A. Not after she came back from the hospital.

(Deposition of Guy A. Smith.)

“Q. You did decide from all that it wasn’t necessary? A. Yes.

“Q. How many times did you talk to Mr. Myers and Schueler and Mr. Veazie about this?

“A. I talked to Mr. Veazie once, Mr. Myers twice.

“Q. What was the occasion about the conversation twice with Mr. Myers?

“A. He asked all about the facts, how it happened, and so [247] on.

“Q. And you went over your answers at that time, of course? A. Of course.

“Q. You say she told you she had a bad knee and it had been bad for a long, long time?

“A. She told me she had trouble before with it.

“Q. To refresh your recollection, didn’t she say there was sort of a drawn feeling—hurt?

“A. She called it a ‘trick knee,’ whatever that is.

“Q. But she did not tell you, did she, this knee ever locked and caused her a lot of pain and caused her to fall, and that sort of thing?

“A. No, she never said that.

“Q. You know the Number 5 business, but don’t recall how long she had been working as a punk there? A. Not exactly.

“Q. But you do remember it was Number 5?

“A. Yes.

“Q. But you don’t remember whether she worked two weeks or a month as a punk?

“A. No.

(Deposition of Guy A. Smith.)

“Q. How do you suppose you remember it was Number 5, so distinctly?

“A. I can remember where this accident occurred.

“Q. But you didn’t think there was any accident? [248]

“A. No, I didn’t think there was any accident. I figured she hurt herself, of course.

“Q. Well, what did you think?

“A. I figured she might have aggravated an old injury.

“Q. But you did not consider it an accident?

“A. No.

“Q. And consequently made no note of it?

“A. No.

“Q. At what stage of the development did you decide there was an accident?

“A. I never knew there was an accident until she turned it in to the office.

“Q. She always told the same story; she hurt her knee on the job that night?

“A. I never talked to her.

“Q. How many sawyers on the job that night?

“A. Well, I would say around four.

“Q. You know there were four, as a matter of fact? A. Usually have four, as a rule.

“Q. How many punks? A. Four.

“Q. You could not be mistaken, and only had two? A. Two punks?

“Q. Sawyers and punks?

“A. No, I couldn’t, I can’t recall. [249]

(Deposition of Guy A. Smith.)

“Q. Your best recollection is there was four?

“A. That is what they usually have, yes.

“Q. Why don't you recall that? You know it was Number 5, but you don't know how many sawyers there were. Why is that?

“A. Sometimes we haven't that many there; sometimes more.

“Q. Sometimes you don't run the mill, but the truth is you don't know how many sawyers were there the night she got hurt?

“A. I couldn't answer that.

“Q. Mr. Myers didn't go over that with you, is that it? A. No.

“Q. How long had she worked in Pit Number 5?

“A. That night?

“Q. Yes.

“A. She had just got down on the job, she had been working in 4 before.

“By Mr. George:

“Q. When she works on the off-bearing or rip-saw what are her duties? A. On the rip-saw?

“Q. I understood you to say you put her on the——

“A. (Interrupting): Yes, her duties are taking the shocks away from the rip-saw and putting them on the truck.

“Q. She did all right that night?

“A. Yes. [250]

“Q. She pushed the truck?

“A. As far as I know.

(Deposition of Guy A. Smith.)

“Q. Didn’t get someone to push it for her?

“A. She has help, a helper that helps her.

“Q. But the helper didn’t do it all that night?

“A. I don’t remember. I guess she did all right, so far as I know she performed her duties all right after she came back to work.

“By Mr. Sims (resuming):

“Q. Are you the foreman that told her you though probably she had better quit?

“A. Yes.

“Q. What was the occasion?

“A. She kept complaining, said she couldn’t seem to do any good over there; I asked her if she wasn’t able to do the work why didn’t she quit.

“Q. She complained about her knee, and she had so much pain she couldn’t do anything?

“A. Never complained about the knee a bit.

“Q. As far as you know she hasn’t any complaint at all?

“A. She told me she felt exhausted, and felt faint all the time.

“Q. But never told you there was anything the matter with her knee?

“A. Not when she quit, no, sir. [251]

“Mr. Sims: I think that is all.

“By Mr. George:

“Q. Did you have charge of safety in the mill?

“A. Yes.

“Q. Do the doctors’ reports come back to you?

“A. No.

(Deposition of Guy A. Smith.)

“Q. You don’t know when she went to the hospital,—what the hospital says is wrong with her?

“A. No. I asked her the night she went to the hospital. I didn’t want her to work. She said they told her to go back to work.

“Q. You, in the mill, would know that?

“A. I don’t know, unless they have a record of it in the office.

“Q. You would not know the reports came back there that said she had a floating semilunar?

“A. No.

“Mr. George: That is all.

“Mr. Veazie: That is all.” [252]

ANNA JEFFRIES

was thereupon produced as a witness on behalf of the defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Powers:

Q. How long had Mrs. Smith been working at this particular type of work?

A. Mrs. Smith had not worked on this job very long.

Q. What is the fact as to how she got on that job?

A. Well, I will tell you how Mrs. Smith got on that job. There was a young girl there—I don’t know just how to say this, but there was a young girl working there——

(Testimony of Anna Jeffries.)

Mr. Sims: If the Court please, I don't think it makes any difference how she got on the job.

Mr. Powers: I am asking her if she knows.

Q. I am asking you if you know. Did you ever hear Mrs. Smith ask to be put on that job?

A. Mrs. Smith asked for the job.

Q. Whom did she ask?

A. She asked Guy Smith.

Q. You heard that, did you? A. Yes.

Q. Had you seen Mrs. Smith around there for some time? A. Yes.

Q. State to the jury whether Mrs. Smith ever complained to you or indicated she had had trouble with her leg before May 15, 1943?

A. Yes, sir. In February, we had a terrible snow storm [268] and I was snowed in and forced to walk to work. I went down to Mrs. Smith's house, and she asked me if I ever had my legs swell, and I told her my legs never swelled but my feet did, and she showed me—she said, "My knee is swollen. I don't know what it is—whether it is from standing or not."

I said, "Well, you had better get you a hospital ticket and see about it, because it could be milk leg."

Q. Was that in February,—what year?

A. That was in February of 1943.

Q. Did you ever see any other evidence, before this incident of May 15, 1943, indicating she had trouble with her knee?

A. Yes, Galina was in her home—Galina showed

(Testimony of Anna Jeffries.)

me her leg, and it was swollen. She had a band on it of some kind—oh, they use them to wrap their legs if they have varicose veins or something. She had that on. It was in the wintertime. I saw this in Galina's own home.

Q. Around the mill, did you see her favor her leg at all? A. Yes, she did.

Q. When was that and where?

A. In the rest room. We have one-half hour for our dinner period. Instead of an hour we have one-half hour and, naturally, when that whistle blows you are allowed to go to the clocks and punch out. I never ate very much in the ladies' rest room. We have a bed and we have two chairs in [269] there, and there was enough girls to take them up. Galina happened to find a nail—happened to find one of these nail kegs and she brought it into the rest room, and she always tried to get her a chair, and then she would put her feet up on the nail keg, and she would sit in the chair and eat her lunch and put her leg up on the nail keg. She said, "We have to get some benches in here," and so she brought in some boards—I don't know if she asked the millwright to make the benches or not but, eventually, we got benches in there.

Q. She put her leg up on the keg? Was that before this accident? A. Yes, sir.

Q. Of May 15th? A. Yes.

Q. You were there that night and you saw her?

A. Yes.

(Testimony of Anna Jeffries.)

Q. Tell the jury whether this was in Number 5 or Number 4 where the incident occurred?

A. It was in Number 5.

Redirect Examination

By Mr. Powers:

Q. You saw Mrs. Smith come back, after she went to the hospital? After she went to the hospital that night?

A. I saw the accident, if you would call it that. I saw Mrs. Smith the night she came back from the hospital.

Q. What kind of work did she do after she came back that night? [277] A. She punked.

Q. Did I understand you to say you saw her when she went down on this floor? A. No, sir.

Mr. Sims: She said she saw the accident.

A. This is just exactly what I saw: I was up on the walk, the crosswalk, and I saw Galina going right behind—get right behind the bar and step over it and go down into the table. She sat on the edge of the table for a little while and, I don't know, she just slid off there on the floor.

I went ahead with my work and, all of a sudden, I saw Guy Smith go up there, and I looked up, and Galina was standing right by the side of her table. I watched—she looked awfully white and I went to her and said, "Galina, what is the matter?" She said, "I believe I tore my knee out of joint." I said, "You had better get out and go to the hospital." She said, "Guy has already gone to get somebody to take me to the hospital."

(Testimony of Anna Jeffries.)

When she got out of the place where she worked—we call it a pit—it was just “up and over.” She got up to the roll and throwed her leg over and come down, and when she come down she went way down on her right side and I said, “Galina, if you didn’t hurt your leg in there,” I said, “you have sure hurt it now.” She walked away towards the back of the building, limping. [278]

Mr. Powers: I believe that is all.

Recross Examination

By Mr. Sims:

Q. You say she came out over the roll?

A. Yes.

Q. Did you hear the testimony of Mr. Leacock that she went under the roll?

A. I heard that, sir.

Q. You think Ed is mistaken?

A. I honestly do, and I know——

Mr. Powers: I think the witness is not required to comment on the other witnesses’ testimony.

Q. (By Mr. Sims): Were these power-driven rolls? A. Yes, sir.

Q. You were using a truck to take this material from the rolls? A. Yes, sir.

Q. But you were not busy that night?

A. Well, I will tell you, we only had one cutter on duty on the cutoff. The rest of them were getting off—Number 9, I believe it was, and 10 and 11 was the scrap saw.

Q. You did not have four sawyers going that night on the cutoff saws?

A. No, and to my knowledge—— [279]

(Testimony of Anna Jeffries.)

Q. What, if any statement, was made there about Mrs. Smith having had trouble with her leg before? State the conversation.

A. There was just a few words exchanged between her and the foreman.

Q. What words?

A. When she came in—do you want me to repeat it?

Q. Yes.

A. The foreman said, “Well, were you attended to all right?” She said she was, and then she expressed a desire to work the rest of the shift, and he said, “Did your knee ever cause you any trouble before?” And she said, “Yes, I have had a lot of trouble with that knee.” [285]

MOTION BY DEFENDANT FOR ORDER DIRECTING JURY TO RETURN VERDICT IN FAVOR OF DEFENDANT

Mr. Powers: Comes now the defendant, if your Honor please, and moves the Court for an order directing the jury [287] to return a verdict in favor of the defendant on the grounds and for the following reasons:

First, that there is no evidence now in this case that the plaintiff jumped. She has not said this time that she had jumped in as she claims in her pleadings and as in the pre-trial order. She said she did not know how she got down into the pit. Obviously, if she got in, sliding off the table, there

would be no way here that the jury could return a verdict in favor of the plaintiff.

Secondly, it appears from the medical evidence that her condition could be the result of one or two or more causes;

And, third, that under the Employers' Liability Act of the State of Oregon, the Act here now, under the evidence, would not be violated as a matter of law for the Court to decide it is a perfectly simple thing for the plaintiff to get on the floor and, as admitted, she was not injured in connection with any machinery, any electricity, or any moving devices, and I believe we are entitled to a directed verdict.

(Argument of counsel.)

The Court: We will adjourn now until tomorrow morning.

(Thereupon at 5:30 P.M. an adjournment was taken until 9:30 A.M., December 5, 1946.)

(Court reconvened at 9:30 o'clock A.M., December 5, 1946, pursuant to adjournment.)

The Court: Mr. Powers, on your motion, I am going to reserve decision on it until after the verdict of the jury. I read this Barker case before. I reread it last night. There is no doubt but what it makes a material change in the law of the State under the Employers' Liability Act. It says that the question is not as to the general nature of the plaintiff's employment, as to whether that involves risk and danger, but whether the particular thing she was doing at the time involved risk and danger.

To make it apply to this case, there was a picture circulated here of the Shevlin-Hixon plant. Under the Barker case, employees in the office, like that gentleman in the back of the room who testified yesterday, doing clerical work, would not have the same rights under the Oregon Employers' Liability Act as a man riding a carriage. That distinction had not been previously maintained. The effect of this decision, without doubt, is to wipe out that early-day taxicab case where the taxi driver was hurt, while changing a tire.

Another kind of case that it wipes out is the case where the dishwasher was hurt and was allowed to recover because she was working in the same room, even though some distance from machinery. It wipes out another type of [289] case, like the one where the man was unloading hams from a Southern Pacific car, passing them from one man to another. In all of these cases the Act itself applied because of the general nature of the employment, because the general nature of the employment was hazardous.

The Employers' Liability Act has given everybody a good deal of trouble. There is no act quite like it, as far as I have found. As far as the Supreme Court decision in this particular case is concerned being the law of the case, the law of this case is what the courts of the State of Oregon say by way of interpreting the Liability Act. The Barker case, having come down after the Supreme Court decision, it must be given here, as well as by them, proper consideration, and I would think, with this case, it would be up to me, under the practice

as I understand it in the State courts, to determine as a matter of law whether or not the particular activity of the plaintiff came within the Liability Act. The Oregon Supreme Court, in the Barker case, determined that question as a matter of law, and these other cases that I have mentioned, and many others, have been determined as a matter of law.

It might be, that under normal circumstances, at this stage of this case I should determine, as a matter of law, whether or not this particular activity by this plaintiff, according to your theory, as the Supreme Court says [290] here, was inherently dangerous. That is not the doctrine of the Barker case. The words of the statute say that it must involve risk and danger, and the Court, in dealing with this motorman who got off ahead of the car to clear the switch, held that what he was doing at the time came within the Act and definitely declined to pass on whether or not the normal duties of a motorman came within the Act. They said that what he was doing was inherently dangerous.

So, applying that here, the question would be normally whether this plaintiff, according to her theory, went to work the way she says she had to do in getting down off the table, whether it was inherently dangerous in getting down off a 33- or 36-inch table in the way she said she was required to do it. I am going to submit that question to the jury whether or not getting down off the table, in order to get down to where she was working, was inherently dangerous, and I am going to take a verdict not only on

that, but generally, so your motion is provisionally denied. The question is reserved. Now, you may proceed.

(Argument by counsel for defendant to the jury; closing argument by counsel for plaintiff.)

(Recess.) [291]

COURT'S INSTRUCTIONS TO THE JURY

The jury was thereupon instructed by the Court, orally, as follows:

The Court—The first question in any case of this kind, Ladies and Gentlemen, is whether the plaintiff is entitled to recover from the defendant. It is always a good idea to consider that question first, because, if you conclude that the defendant is not liable, there would be no reason to go further in the case and plaintiffs, including this plaintiff, always have the burden of proof by a preponderance of the evidence, preponderance of the evidence meaning the greater weight of the evidence.

In this case, the plaintiff has charged defendant with a violation of the Oregon State Employers' Liability Act which provides that employers having charge or responsible for any work involving risk or danger to employees shall use every device, care and precaution which is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device and without regard to the additional cost of suitable material or safety appliances or devices. That is the general language of the Act.

In this case, plaintiff says that, to get down [292] to her work, she had to come to a table and she had to get down from that onto the floor level where she worked, and that she was required to jump down and that, as a result of jumping, she was injured.

At the outset, you must decide whether or not to give full effect to all that she says about it. You are the exclusive judges of the credibility of the witnesses and the weight or value of their testimony, including the testimony of the plaintiff. At the outset, you must decide whether that way of getting to her work involved inherent danger. To come under this Act, before plaintiff is entitled to recover, you must find, by a preponderance of the evidence, that that way of getting to her work involved inherent danger. Unless you are satisfied of that, by a preponderance of the evidence, plaintiff cannot recover.

If you are satisfied, by a preponderance of the evidence, that it involved inherent danger and that, as a proximate result of providing and requiring that method of getting to the work—"proximate" means direct cause—plaintiff was injured, then, there has been a violation of the statute and she is entitled to recover such damages as she suffered as a result of the failure to comply with the statute, less such sums as might be charged to her on account of her contributory negligence, if you find there was contributory negligence. [293]

What I mean by that is that defendant has denied all liability, but it is charged, aside from that, that plaintiff herself was contributorily negligent.

Negligence is the doing of some thing that the average, reasonable person would not do under simi-

lar circumstances, or the failure to do something that the average, reasonable person would do under the same or similar circumstances; and the defendant here says that, even though this should be found to be a violation of the statute—providing a way to get to her work—that she could got off the table in a different way and saved herself from being hurt, or reduced the amount of her damages. That is the defense that they have pleaded, aside from a denial of all liability.

As to that defense, the defendant has the burden of proof. Even though you find the defendant is liable, should you also find the plaintiff was guilty of contributory negligence in her own conduct, then, her damages would have to be reduced in the manner which I will describe to you in a few minutes.

Those are the basic issues in the case. Is defendant liable at all for a violation of the statute? If there is a violation of the statute, was plaintiff herself guilty of contributory negligence?

If you find that the plaintiff was injured, as a [294] result of a violation of the statute, by the defendant, she would be entitled to such sum as would fairly and reasonably compensate her for her damages which were proximately and directly caused by the violation of the statute, and which would include pain and suffering that she has had, loss of earnings, and such pain and suffering, if any, which she might be subject to in the future, loss of earnings, also, if any, in the future; and it also would include hospital and doctor bills which she may have. I do not remember the figure about

that. You will remember that testimony. And also including doctor and hospital bills, if any, which might be reasonable and necessary to be paid in the future. Her claim is for a maximum of \$7,000 for general damages and \$400 for special damages, the special damages being the medical and surgical operation and the \$7,000 being the maximum covering all other items of damage.

I do not think I need to say to you, Ladies and Gentlemen, you being the type of people that you are, that neither sympathy nor prejudice should influence you in arriving at your verdict. You are called here from all walks of life. You have sat on other cases. You must find your verdict under all the facts as presented and under the instruction that I give to you.

You will have a number of exhibits to consider. You will give them the weight that you feel they are entitled [295] to, along with the evidence that you have heard from the witness stand.

This case has been a little different from most cases, in that testimony of various witnesses has been read to you; for various reasons that we are not interested in at this time, the testimony of these witnesses was previously taken in that manner and offered to you by reading what they said at that time. You will give that testimony the same weight you would if those people were here, whatever weight you feel it is entitled to, along with the other evidence in the case. Of course, it is better to have the people here where we can see them and be able to judge as to what weight should be given to their testimony.

This case, like most cases, presents a conflict of testimony. You are going to have to choose between the stories told by the witnesses. Everything that has been said here cannot possibly be true. People's recollections are different. The interests people have have a lot to do with the way they testify. Those are matters that are peculiarly for your consideration. You will have to reconcile that testimony, in arriving at your verdict, which, by the way, must be unanimous, like all verdicts in this court. You will elect a foreman when you retire and he will sign your verdict.

I think I might say again that the first question [296] is whether or not the defendant is liable to the plaintiff. If you find that there has been a violation of the statute that proximately caused plaintiff's injuries, then plaintiff is entitled to recover. If you do not find liability as to the plaintiff, that ends the case and defendant is entitled to a verdict. If you do find liability, then it will be proper for you, in determining the amount of damages that plaintiff is entitled to, to consider along with that the question of contributory negligence, if you find there was contributory negligence. If you find there was contributory negligence, then that would reduce the amount you find she was entitled to, in proportion to her contributory negligence. The way we usually do that is in the form of percentages. Taking 100 per cent of the total of all negligence in the case, if the proportion of plaintiff's contributory negligence was 10 per cent of all negligence, then you should reduce the amount of the

verdict by 10 per cent. If the contributory negligence was larger than that, you would reduce the damages accordingly. In other words, contributory negligence is not a defense to this statute, but it should be taken into account in the amount of the verdict.

Do you want me to add anything before the jury retires? You may take your exceptions later.

Mr. Powers: No, I think your Honor has covered it, [297] unless your Honor wants to speak about whether the injury actually came from this condition.

Mr. Conway: We have nothing further, at this time, your Honor.

The Court: You may go upstairs, Ladies and Gentlemen. We will send the exhibits up in a few minutes. Do not begin to deliberate until the exhibits arrive.

(The Bailiffs were thereupon sworn.)

The Court: We have two forms of verdict, one a straight form for the defendant and the other with the amount of damages blank. That form, you will sign if you find for the plaintiff. Do not begin to deliberate until the exhibits are sent up to you.

(The jury thereupon retired at 11:28 A.M.)

PLAINTIFF'S EXCEPTIONS TO COURT'S INSTRUCTIONS

Mr. Conway: If the Court please, I notice under Rule 51 of the Rules of Civil Procedure, it pro-

vides that the Court shall inform counsel of its proposed action on the requested instructions prior to arguments to the jury, and I think probably the Court in this instance overlooked that particular situation, in that we did not have any opportunity to know what to say about some of these instructions or requests. I think, just for the purpose of the record, your Honor, we would like to have an exception. It was [298] evidently due to an inadvertence.

The Court: It was not through inadvertence. For the purpose of the record, I do not feel I am under any obligation to specifically discuss twenty-five or more requested instructions. That rule has its place and serves a useful purpose, but it cannot apply to all circumstances.

Mr. Conway: I did not have that in mind, your Honor. I was not criticizing that.

The Court: That is all right. You are entitled to criticize, but I am entitled to state my view of it.

Mr. Conway: I did not mean it the way your Honor thought. That is what I am getting at.

The Court: Sir.

Mr. Conway: I did not mean it the way you think. What I was getting at was that we were entitled to have a general idea as to how you were going to instruct. I did not mean specific requests. I appreciate you could not do that in this kind of a situation.

The Court: That means you advise the Court on all questions in the case. You people are personal injury lawyers. You try cases under this Act and

you try cases all the time. You know what the range is of possible instructions in these cases. The Act is just what it says it is. If there has been a violation of the Act which proximately results in damages, then it applies; if there is contributory negligence, [299] it is what the statute says.

Every now and then, somebody, just like you, trips me up a bit and says that they did not have full elucidation before they began to argue to the jury, as to what I was going to tell the jury. As I say, that rule has to be applied rather liberally and, unless counsel wishes to cite some particular regard in which they have been hampered in their argument to the jury, I just do not think that that is a valid objection. If you have some particular point, you and Mr. Sims, to cite wherein your argument to the jury has been handicapped by not knowing what I was going to say to the jury, have it put of record.

Mr. Conway: I might say this, in that connection, since your Honor has mentioned it: We did not know what you had in mind when you made the statement, before the argument this morning, about what you meant by "inherently dangerous," in regard to this particular operation; we did not know how you were going to instruct on that particular matter.

The case of Barker against Portland Traction Company, which Mr. Powers called your Honor's attention to yesterday afternoon when he made his motion for a directed verdict, in the October 1, 1946, Advance Sheets of the Supreme Court of Oregon,

intimates in the opinion that we are within our rights to still be within the interpretation [300] placed by the Circuit Court of Appeals in connection with this particular operation, to the effect that it does involve risk and danger.

Here is what I mean by that, your Honor: The Oregon Supreme Court, in this Barker case, at page 70 and page 71, says: "The Employers' Liability Act, as this Court has many times said, deals only with duties and employments which involve inherent risks and dangers. Duties and employments attended only with ordinary risks and dangers are unaffected by the Act. Since the plaintiff was not injured while aboard his streetcar, we have no occasion for determining whether the operation of street cars is within the protection of the Employers' Liability Act."

Then, they go on: "We neither express nor intimate any impression upon that subject. The plaintiff was injured while removing snow from a small area of the public street, and, as we have indicated, work of that kind is not inherently dangerous."

Continuing, on page 71: "We do not believe that the plaintiff's contention is warranted by any language of the Employers' Liability Act. Certainly no express provision of the Act extends its protective features to employees engaged in the performance of non-hazardous work. According to our interpretation of the Act, its protection is available only to (1) employments which are attended [301] with inherent risks and dangers, and (2) employments which are rendered hazardous through the

use of machinery, scaffolding, dangerous substances, electrical devices or other equipment and substances which are expressly enumerated in the Act. Any other construction of the Act would not only import into it a provision which is not there, but would grant to a streetcar operator, who occasionally cleans a switch, the protective features of the Act, and withhold them from the switchmen and greasers who daily work about the switches."

What I am trying to get at, your Honor, is, according to our contention in this case, this work is inherently dangerous, because it does involve risk and danger, by reason of the fact that this machinery is very close to the operating pit or trap, whatever you want to term it, where the plaintiff was required to work. She had this saw within two or three feet of her head or arm or shoulder, wherever it was, according to the evidence, and she also had these live rolls right alongside of the table where she was enclosed in this pit.

There was some testimony, also, your Honor, that showed the punks were afraid, some of them, to go over the rolls, because they thought it was dangerous to go over the rolls.

Then, we have these saws going back and forth, as the testimony shows. Suppose something happens to one of these saws and it flies off or falls off. That is very dangerous, inherently dangerous. That is our position here. That is what we mean by that, your Honor. That is our interpretation of what it means.

Now, the appellate court here has practically said that in its opinion, as I understand it. That

is what I meant, your Honor, by the statement that we did not intend what you mean, when you said you were going to tell them something about its being inherently dangerous.

The Court: No, I told you I was going to submit the question of fact whether this was inherently dangerous.

Mr. Conway: I mean, in our interpretation of what you were going to instruct. That is what I am getting at. We could not say anything about it in our argument.

The Court: Mr. Sims did the arguing.

Mr. Conway: Well, I know, but I know he did not have the scope of your instructions in mind. That is what I mean.

With reference to the requested instructions that we submitted to your Honor, just for the purpose of the record, I think we were entitled to an instruction to the effect that this work did involve risk and danger, and so forth. Under the evidence introduced in this case, I think we should have that instruction as a matter of law. That [303] is the substance of Requested Instruction No. 1. The reason for that is that we feel it is contrary to the facts and the law because that was not given.

Instruction No. 2 is to the effect that she injured her knee in jumping from the table to the floor, and we ask that, if the jury found she would not have done so had the company removed the rolls so she could have walked in there—we feel we were entitled to that instruction because of the circumstances here, your Honor.

With reference to Requested Instruction No. 3, we have no complaint. The same with No. 4. The same with No. 5.

With respect to Plaintiff's Requested Instruction No. 6, we respectfully requested that if the jury found that there was a violation of the Act, it would be negligence, in and of itself, or negligence per se. We think we were entitled to that, because that is the substance of the Appellate Court decision in this case at bar, also.

Then, Plaintiff's Requested Instruction No. 7, to the effect that the duty of the employer is absolute and non-delegable, and he must see that his directions are performed with reference to not jumping. In other words, the evidence of the foreman would indicate that he did not tell the plaintiff to jump, and we feel, under the decision of the Appellate Court here, that instruction should have [304] been given.

As to Requested Instruction No. 8, about the assumption of risk, we have no complaint on that.

With respect to Plaintiff's Requested Instruction No. 9, your Honor, that refers to providing a reasonably safe place to work and reasonably safe appliances with which to do the work. It was not given and we think we were entitled to that under the law.

Then, as to the Plaintiff's Requested Instruction No. 10, your Honor, that is the one with reference to the highest degree of care being required of the employer under the Employers' Liability Act. It is self-explanatory.

Plaintiff's Requested Instruction No. 11 is, briefly, that the defendant company failed to furnish employment which was safe and a safe place to work, and that it is up to the jury to find certain things contained in that requested instruction, in regard to that situation, and then, if there was a violation of that condition, as indicated, that would be a violation of the law, and so forth.

Then, Plaintiff's Requested Instruction No. 12 is to the effect that it would have been practicable to have provided a re-arrangement of the equipment so as to not be necessary for punks to enter their place of employment by jumping from the table top down to the floor or [305] crawling over the rolls. "If you find the defendant failed to do that, then you must find defendant was negligent." We except to the Court's failure to give that instruction, because we feel that is what the evidence shows and, therefore, it would be contrary to the law not to give that instruction.

Then, Requested Instruction No. 13, your Honor: We ask in that instruction whether or not the company could have done anything that they failed to do which would have prevented plaintiff from being hurt. That is the effect of it. The requested instruction has to do with whether there was a device or care or precaution that the company could have used or installed in making it needless for Mrs. Smith to have jumped and, if so, that should have been done—without impairing the efficiency of the machinery, of course. We think it is contrary to the law not to have given that instruction.

In regard to Plaintiff's Requested Instruction No. 14, if the jury found that the company, through its foreman, instructed Mrs. Smith to jump into the pit in connection with performing her duties and that she was injured as a result of obeying those instructions, then the jury must find that the company was negligent as a matter of law and it would be liable for all resulting damages to Mrs. Smith. We except to the failure of the [306] Court to give that instruction because it is contrary to the evidence and the law that it not be given.

With respect to Plaintiff's Requested Instruction No. 15, your Honor, with reference to the company requiring Mrs. Smith to work in a place to which the only ingress was by means of a 33-inch jump, and if she was injured as a result of performing her duties in that manner, the jury must find the company negligent as a matter of law, and that the company would then be liable for all resulting damages to Mrs. Smith. The failure to give that requested instruction is, we believe, contrary to the facts and the law involved here.

Plaintiff's Requested Instruction No. 16, your Honor, is similar to the previous instruction—excuse me, I am wrong. Requested Instruction No. 16 is under Section 5 of the Employers' Liability Act. We think we are entitled that under the Circuit Court of Appeals decision.

Plaintiff's Requested Instruction No. 17, your Honor, refers to another situation where the Act makes it plain that the duty upon the employer is absolute and non-delegable and continuing, inas-

much as the employer can in no way be absolved from liability by trying to delegate that duty to an employee and so forth, the purpose of the law being, namely, to protect the life and limb of the employee. We believe that situation is indicated here, because [307] she had to have a safe place in which to work at all times, and we except to the failure of the Court to give that requested instruction.

Plaintiff's Requested Instruction No. 18, that the jury be instructed that a punk, as a matter of law, is not one in charge or control of the work under the Employers' Liability Act. We feel the failure of the Court to give that instruction is contrary to the law and the facts here.

Then, Plaintiff's Requested Instruction No. 19: We ask in this requested instruction that your Honor instruct the jury that if they find there was a care and precaution that was not used by the company that was applicable to use, practicable, I should say, for the protection of Mrs. Smith and the employees generally and which, if used, would not have limited the efficiency of the operation and, if it had been used, would have protected Mrs. Smith from injury, the injuries which she suffered and does suffer, then the jury must find the defendant guilty of negligence, and we believe that is referred to in the opinion of the Appellate Court in this case, and that failure to give that instruction is contrary to the law involved.

Then, Plaintiff's Requested Instruction No. 20: We feel that the jury should know that the Em-

ployers' Liability Act was a remedial and definite step and should be liberally construed for the purpose of protecting workmen, and that it [308] is the purpose of the law to protect employees, including Mrs. Smith. We feel that the failure of the Court to give that instruction is contrary to the law involved here and the facts.

Plaintiff's Requested Instruction No. 21 is just a general instruction as to negligence and so forth, and we have no particular complaint about that.

Plaintiff's Requested Instruction No. 22: We felt, by reason of the fact that the evidence came in in the way it did, the jury might get the idea that because Mrs. Smith knew about danger and risk of her job that she assumed the risk when she continued to work there and we thought, if that were true, that the jury should know that that was eliminated under the law and that that could not be considered by the jury, and so forth. We feel that the failure of the Court to give that instruction is contrary to the law involved here and the facts adduced from the witness stand.

Plaintiff's Requested Instruction No. 23. We have no complaint on that because your Honor covered that situation.

Plaintiff's Requested Instruction No. 24 is to the effect that if the jury found as a fact that no one else had been injured, that does not excuse defendant from liability because this accident did occur. We think that instruction should have been given, because it is set out [309] on pages 9 and 10 in the Appellate Court's decision in this case.

We again refer to page 13 of the Appellate Court's opinion in this case. We believe Plaintiff's Requested Instruction No. 24 should have been given.

That, I believe, your Honor, is the gist of our exceptions for the record.

The Court: The objections will be noted and exceptions allowed.

Defendant's Exceptions to Court's Instructions

Mr. Powers: May it please the Court, the only exception we would ask is with respect to Requested Instruction No. 5 and No. 14, having to do with aggravation. There was some testimony by their doctor to the effect that the plaintiff has traumatic arthritis, and they make no claim at all in the complaint of any such condition, and we thought that should have been eliminated from the case.

Then, Requested Instruction No. 8, which follows that Barker case, which we felt the Court should have given, in withdrawing from the jury's consideration the provision of the Act respecting the machinery, because here the plaintiff was not injured by any machinery and does not claim to have been. Requested Instruction No. 6, which is to the effect that the employer is not required to have the most [310] modern or the newest methods, under the Act. We wish to except to those requested instructions.

The Court: The objections will be noted and exceptions allowed. Court is now in recess.

(Recess.)

(The jury returned into court at 4:10 o'clock P.M. with its verdict.)

The Court: Will you bring the verdict up, please?

The Foreman: Your Honor, before we bring this verdict in, may I ask you a question?

The Court: Let me see the verdict, first. (Verdict handed to the Court.)

The Foreman: Is it true that the figure asked the verdict in this case includes the \$400 special damages asked for by the plaintiff?

The Court: Ask that again.

The Foreman: Is it true that the figure asked for in the verdict——

The Court: Included in the verdict.

The Foreman: ——includes the special damages asked for by the plaintiff?

The Court: My answer to your question is that this is all the recovery the plaintiff can get.

The Foreman: Thank you.

The Court: That is really what I understand you to say. [311] Will you read this please, Mr. Clerk? It is signed by the foreman.

(The verdict was then read by the Clerk, awarding damages to plaintiff in the sum of \$5,900.)

The Court: Is that your verdict, Ladies and Gentlemen?

Jurors: It is, your Honor.

The Court: The verdict will be received and filed and judgment entered on the verdict.

(Adjournment.) [312]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, Court Reporter, hereby certify that on, to-wit, December 3, 4 and 5, 1946, I reported in shorthand the testimony and proceedings in the above-entitled cause and court; that I thereafter caused my said shorthand notes to be reduced to typewriting; and that the foregoing, consisting of pages numbered 1 to 312, both inclusive, constitutes a true, full and accurate transcript of my said shorthand notes, so taken as aforesaid.

Dated at Portland, Oregon, this 11th day of February, A.D. 1947.

IRA G. HOLCOMB,
Court Reporter. [313]

[Endorsed]: No. 11567. United States Circuit Court of Appeals for the Ninth Circuit. Shevlin-Hixon Company a corporation, Appellant, vs. Galina M. Smith, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 19, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11567

THE SHEVLIN-HIXON COMPANY,
a Corporation,

Appellant,

vs.

GALINA M. SMITH,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY ON AP-
PEAL AND APPELLANT'S DESIGNA-
TION OF PORTION OF RECORD TO BE
PRINTED ON APPEAL.

To the above named plaintiff-appellee, Galina M. Smith, and to E. U. Sims, Harry George, Jr., and John F. Conway, your attorneys:

You and each of you will please take notice that the said appellant, The Shevlin-Hixon Company, hereby adopts as its points on appeal the Statement of Points on Appeal appearing in the Transcript of the Record which has been certified to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit; and the appellant hereby designates the following portion of the record to be printed in this appeal:

1. Pretrial order formulating issues.
2. The verdict of the jury in the within cause,

dated December 6, 1946, and judgment entered thereon dated December 24, 1946.

3. Defendant's motion for judgment notwithstanding verdict and in the alternative as a motion for new trial, made on December 12, 1946.

4. Notice of appeal.

5. Statement of points to be relied on upon appeal.

The following portions from the transcript of testimony and proceedings had during trial:

6. The following portions of the testimony of the plaintiff, Galina M. Smith: beginning on page 187 and ending at the bottom of page 193; and again, beginning on page 203 with the words "I think there is no question," and ending on page 210.

7. The last Q. and A. of witness Curtis on page 56 of the transcript.

8. That portion of the testimony of witness Norton, beginning on page 59 with the Q., "How did you get in and out of these pits?" and ending with the first A. on page 60; and the following Q. and A. appearing on page 64:

Q. Do you know how the women who worked as punks were dressed? How did you dress, for instance?

A. All of the girls wore slacks or overalls.

9. That portion of the testimony of witness Wuthrich, beginning with the first Q. on page 126 and ending with the first A. on page 127; and again, with the Q. on page 132, "Getting down to where

you worked, you said you got down on your feet and then got down onto the floor?" and ending with the last A. on the same page.

10. The following portions of witness Long's testimony: Beginning with the last Q. on page 165, and ending with the first A. "Yes" on page 166.

11. The following testimony of the witness Hufstader: On page 178, beginning with next to the last Q. on that page, and ending with the first A. given on page 179.

12. That portion of the witness Guy Smith, beginning with the last Q. on page 243, and ending with the first A. given on page 244; and from the same witness, beginning with the second Q. asked on page 248 and ending with the third A. thereafter.

13. The following portions of witness Jeffries' testimony: Beginning with the first Q. asked on page 268, and ending with the last A. on direct examination on page 270; again, from the same witness, beginning near the bottom of page 277 with the words "You saw Mrs. Smith come back, after she went to the hospital?" and ending with the last A. on page 279.

14. That portion of witness Burkhart's testimony, beginning with the second Q. on page 285 and ending with the third A. given thereafter.

15. All testimony of the witness E. G. Chuinard, which begins on page 66 and ends on page 103.

16. That portion of the testimony of the witness Edward Leacock beginning with the first Q. on page 211 and ending with the words, "She said, 'To hell

with the lineup, I have hurt my knee,' ” near the top of page 216.

17. That portion of the testimony of witness Charles R. McClure, beginning on page 139 with the first Q. asked, and ending on page 140 with the answer, “It could not,” in the 7th line from the bottom of the page; and further testimony from the same witness, beginning with next to the last Q. on page 142 and ending with the last A. given on page 148.

18. Beginning near the bottom of page 287, with the words “Motion of defendant for order directing jury to return verdict in favor of defendant,” and ending on page 298 with the words “The jury thereupon retired at 11:28 a. m.”

19. Beginning on page 310 with the words “Defendants exceptions to court’s instructions,” and ending at the bottom of page 313.

20. This appellant’s statement of points on which it intends to rely on appeal, and designation of portions of record to be printed on appeal.

Dated this 3rd day of April, 1947.

/s/ J. C. VEAZIE,

/s/ JAMES ARTHUR POWERS,

/s/ ALFRED C. VEAZIE,

Attorneys for

Defendant-Appellant.

Due service of the foregoing Appellant’s Statement of Points on Which It Intends to Rely on Appeal and Appellant’s Designation of Portion of

Record to Be Printed on Appeal, is hereby admitted in Multnomah County, Oregon, this 3rd day of April, 1947, by receiving a copy thereof, duly certified to as such by Alfred C. Veazie, one of the attorneys for defendant-appellant.

/s/ HARRY GEORGE, JR.,
Of Attorneys for
Plaintiff-Appellee.

[Endorsed]: Filed April 5, 1947.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD HEREIN

To the above named defendant, Shevlin-Hixon Company, a corporation, and to J. C. Veazie, James Arthur Powers and Alfred C. Veazie, your attorneys:

You, and each of you, will please take notice that the above named appellee Galina M. Smith, being dissatisfied with the designation of record of and by appellant herein, hereby designates the following additional portions of the transcript of testimony and proceedings herein which are material for printing in the transcript of record herein, to-wit:

All of the testimony of the following witnesses from the said transcript of testimony and proceedings herein, to-wit:

J. D. Donovan, pages 2 to 20, inclusive, of said transcript.

Dr. Paul Woerner, pages 21 to 30, inclusive, of said transcript.

Dr. J. F. Hosch, pages 33 to 44, inclusive, of said transcript.

Hope H. Clark, pages 44 to 46, inclusive, of said transcript.

Laura Snodgrass, pages 46 to 47, inclusive, of said transcript.

Frances Hastings, pages 48 to 50, inclusive, of said transcript.

W. T. Curtis, pages 51 to 56, inclusive, of said transcript.

Beth Norton, pages 57 to 65, inclusive, and pages 104 to 120, inclusive, of said transcript.

Anna Belle McGrady Wuthrich, pages 121 to 135, inclusive, of said transcript.

Dr. Charles R. McClure, pages 137 to 142, inclusive, and also pages 148 to end of cross-examination on page 159, inclusive, of said transcript.

Clara Long, pages 161 to 171, inclusive, of said transcript.

Norval C. Hufstader, pages 172 to 181, inclusive, of said transcript.

Galina M. Smith, pages 187 to 210, inclusive, of said transcript.

Edward Leacock, pages 211 to 239, inclusive, of said transcript.

Guy Smith, pages 240 to 252, inclusive, of said transcript.

Also the following portions of transcript of testimony and proceedings relative to exhibits, to-wit:

Print all of pages 20, 21, 31, 32, 181, 182, 183, 184, 185 and 186; also instructions numbered 5, 6, 8 and 14 of the Instructions to the Jury as requested by defendant, which is part of the entire record herein.

Dated at Portland, Oregon, this 7th day of April, 1947.

/s/ JOHN F. CONWAY,
/s/ EMERSON U. SIMS,
/s/ HARRY GEORGE, JR.,

Attorneys for
Galina M. Smith,
Appellee herein.

State of Oregon,
County of Multnomah—ss.

Due service of the within Appellee's Designation of Additional Portions of the Record Herein, is hereby accepted in Multnomah County, State of Oregon, this 7th day of April, 1947, by receiving a copy thereof, duly certified to as such by John F. Conway, of Attorneys for Appellee.

/s/ ALFRED C. VEAZIE,
Of Attorneys for Appellant.

[Endorsed]: Filed April 9, 1947.

[Title of Circuit Court of Appeals and Cause.]

MOTION

Comes now The Shevlin-Hixon Company, Appellant in the above entitled cause, and respectfully moves for an order of this Court that the original exhibits in said cause need not be printed, but may be considered in their original form.

/s/ ALFRED C. VEAZIE,
Of Attorneys for Appellant.

Due service of the foregoing Motion is hereby admitted in Multnomah County, Oregon, this 9th day of April, 1947, by receiving a copy thereof, duly certified to as such, by Alfred C. Veazie, one of the attorneys for the appellant.

/s/ JOHN F. CONWAY,
Of Attorneys for Appellee.

So Ordered:

/s/ WILLIAM DENMAN,
United States Circuit Judge.

No. 11567
In The
United States
Circuit Court of Appeals
For the Ninth Circuit

SHEVLIN-HIXON COMPANY, a corporation, *Appellant*,

vs.

GALINA M. SMITH, *Appellee*.

Appeal from the District Court of the United States for the
District of Oregon

HON. CLAUDE McCULLOCH, Judge

Brief of Appellant

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FILED

AUG 16 1947

PAUL P. O'BRIEN,

DAILY JOURNAL OF COMMERCE

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No. 11567

In The
United States
Circuit Court of Appeals
For the Ninth Circuit

SHEVLIN-HIXON COMPANY, a corporation, *Appellant*,

vs.

GALINA M. SMITH, *Appellee*.

Brief of Appellant

Appeal from the District Court of the United States for the
District of Oregon
HON. CLAUDE McCULLOCH, Judge

JURISDICTIONAL STATEMENT

This is an action at law between citizens of different states, (T. 3) in which the appellee claims damages of \$7,400.00 against appellant corporation (T. 7). Judgment in the sum of \$5,900.00 has been entered, based upon the verdict of the jury (T. 10). It is contended that the United States District Court for the District of Oregon had jurisdiction of this action on the basis of

the above facts, under 28 USCA Sec. 41, sub-paragraph (1) as amended; and that the United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction of this appeal, under 28 USCA Sec. 225, sub-paragraph (a) as amended. (T. refers to transcript of record) Italics where used are supplied by appellant.

STATEMENT OF CASE

The judgment was entered in an action for damages by appellee as plaintiff against the appellant as defendant, for personal injuries which the appellee claims to have sustained while she was employed in appellant's box factory at Bend, Oregon. Appellee's work consisted of grading, sorting and bundling small size box lumber which had been cut by a sawyer. Her station was below and out of reach of a saw operated by the sawyer, who slid small pieces of box lumber down to the table where appellee worked. When working, appellee stood at a table 33" to 36" high, (about the height of an ordinary kitchen table) located on the floor level. Her station was about 3' square, surrounded on 3 sides by tables. The fourth side of the enclosure was formed by moving rolls which carried away the pieces of box material bundled by appellee. The means of entering this station was to walk on a catwalk, step or crawl over a rail to the top of the table, and then, at the choice of the employee, either sit on the table edge, and slide or jump to the

floor, or step to the floor, or jump from a standing position to the floor. At the time of her alleged injury, the appellee was entering her station. She had reached the table, and *in descending from the table to the floor she claims to have injured her knee*. Appellee could not say whether she jumped to the floor from a sitting position on the table or whether she jumped to the floor from a standing position on the table (T. 201). The only positive testimony on this point is that of the witnesses Leacock and Jeffries, who testified that she slid from a sitting position from the table to the floor. Neither the saw nor the rolls were operating at this time, as work had not yet started.

The testimony as to how appellee descended from the table to the floor follows: by witness Anna Jeffries (T. 244):

“Mr. Sims: She said she saw the accident.

“A. This is just exactly what I saw. I was up on the walk, the crosswalk, and I saw Galina going right behind—get right behind the bar and step over it and go down into the table. She sat on the edge of the table for a little while and, I don’t know, she just slid off there on the floor.”

And also by witness Edward Leacock, by way of deposition taken on behalf of plaintiff, and introduced in evidence by appellant (T. 208):

“A. * * * I was oiling up. She had anyway five minutes and was sitting on top of this table, which she only had about a foot to slide off to stand on her feet, and when I got ready I said ‘Ready for your lineup?’ She had already slid down off this table which wasn’t only about that high (indicating), I should judge.”

“Q. The witness is indicating about — do that again, Ed, will you?

“A. I should say about (indicating).

“Q. A couple of feet? A. Oh, no.

“Q. Twenty inches? A. Twenty inches.

“Q. All right twenty inches.

“A. And she slid down in there, and I asked if she was ready for her lineups, for her marks for the different grades. Mrs. Smith told me, to hell with the lineup. She said she had hurt her knee.”

Appellee was vague in her testimony and would not say whether she assisted herself in her descent from the table (T. 201-202):

“Q. Will you state to the jury whether, in getting down off the table, you assisted yourself with your hands, or if you sat down so you could slide off, the way you usually slide off the table, or whether you jumped off the table?

“A. I really don’t remember just how I did go about jumping in there.

“Q. You don’t know whether you assisted yourself into the pit or not?

“A. I couldn’t say. I really don’t remember the way I did jump.”

Appellee based her right to recover on alleged violation of the Employers' Liability Act of Oregon (O. C. L. A., Sec. 102-1601). Appellant contends there is no evidence of any violation of the Employers' Liability Act which had anything to do with appellee's injury; that the mere act of descending especially if in a sitting position from a 33" or 36" table to the floor is not inherently dangerous as a matter of law and is not within the meaning of said act; that the trial court erred as a matter of law in refusing to direct a verdict in appellant's favor. There was no contention made of any common law liability.

Plaintiff contended that as a result of her descent from the table to the floor that

"she suffered a fractured bone and semilunar cartilage and other damage thereto, the exact nature and extent of which is unknown to the plaintiff, of her right knee, together with torn and wrenched ligaments of said knee." (T. 6-7)

The testimony produced on behalf of the appellee tended to show that she had a small foreign body, sometimes called a *knee mouse* in her knee, and also her knee showed signs of traumatic arthritis. There was no claim made by appellee in her pleadings or pre-trial order for traumatic arthritis, and medical testimony concerning it was speculative. With respect thereto, Dr. E. G. Chuinard testi-

fying for appellee stated that she told him that she did not land on her knee and further at (T. 96):

“Q. She did not give you any history of twisting or spraining?

A. She said she could not remember. She said the pain was severe but she did not believe the knee had direct contact with the floor.”

And with respect to the foreign body or *knee mouse*, the same witness testified (T. 93):

“Q. Is it not a fact that these little bodies develop as a result of hypertrophic arthritis?

“A. They may come from several things—

“Q. I asked that particular question: Is it not a fact that they do come from hypertrophic arthritis?

“A. You are speaking in general, not this one case?

“Q. Is that not a symptom of hypertrophic arthritis, to have some foreign body, bony substance, in the knee at times?

“A. Yes, it is often found.

“Q. It is very frequently found, is it not? Osteochondritis, don't that start by an impairment to the blood supply in the knee? What is the fact about that?

“A. I think you are bringing up a point that was spoken of, osteochondritis dissecans. Yes, such a condition can occur, due to poor blood supply in any joint.”

This doctor's opinion as to appellee's knee condition was not based upon evidence produced in the case, but rather upon pure speculation as to what might have happened. When asked concerning the history he stated (T. 94-95):

"Q. How much of a jump did the plaintiff tell you she had made?

"A. Well, I cannot answer that question now. I don't remember that she—she described this thing to me at the time but I can't tell you how many feet she jumped.

"Q. In the absence of knowing how far she jumped, is it not difficult for you to tell the jury that she landed with sufficient force that she would drive one bone against the other and break off a piece of bone?

"A. Well I presume that I did know at the time, but if I were to say definitely just how far a person jumped now, I cannot say because——"

And again at (T. 102):

"Q. Although you do find foreign bodies very frequently in the knee joint? They call them 'joint mice?' A. That is right.

"Q. That is, without any accident at all?

"A. That is right.

"Q. Here, if it developed the plaintiff had had trouble with her knee prior to that time, that would be consistent with a diseased condition, would it not?
(93)

“A. I would say this: I would rather believe this patient had had a previous injury which caused this trouble than that she had had any diseased condition which caused it. I can’t say that these findings in her X-rays or her symptoms are due to this accident that she is claiming. I have no way of saying that. However, everything is compatible with that, but the appearance of the X-rays indicates to me definitely that at some time she had a trauma which caused her trouble, rather than a diseased process.

“Q. When you say that you probably hear about these things every day, according to the history she gave you, it is an unusual thing for you to find broken pieces of bone from the femur, is it not, from a trifling accident like that?

“A. It is not as usual as some things, but it is not unusual altogether. *Let me reiterate a point I made. I don’t know that this came from the end of the femur. It might have been just a calcified hematoma.*” (Emphasis supplied)

Appellee denied she had any prior trouble with her knee. (T. 203-204) :

“A. *I had never complained of that knee up to the time of the accident.* I had never had any trouble with it.” (Emphasis supplied)

It was the theory of defendant that plaintiff’s knee trouble was an old condition which she had prior to the alleged accident. Witness Anna Jeffries so testified (T. 242-243) :

"Q. I am asking you if you know. Did you ever hear Mrs. Smith ask to be put on that job?

"A. Mrs. Smith asked for the job.

"Q. Whom did she ask?

"A. She asked Guy Smith.

"Q. You heard that, did you? A. Yes.

"Q. Had you seen Mrs. Smith around there for some time? A. Yes.

"Q. State to the jury whether Mrs. Smith ever complained to you or indicated she had had trouble with her leg before May 15, 1943?

"A. Yes, sir. In February, we had a terrible snow storm (268) and I was snowed in and forced to walk to work. I went down to Mrs. Smith's house, and she asked me if I ever had my legs swell, and I told her my legs never swelled but my feet did, and she showed me—she said, 'My knee is swollen. I don't know what it is—whether it is from standing or not.'

I said, 'Well, you had better get you a hospital ticket and see about it, because it could be milk leg.'

"Q. Was that in February,—what year?

"A. That was in February 1943.

"Q. Did you ever see any other evidence, before this incident of May 15, 1943, indicating she had trouble with her knee?

"A. Yes, Galina was in her home — Galina showed me her leg, and it was swollen. She had a band on it of some kind—oh, they use them to wrap their legs if they have varicose veins or something. She had that on. It was in the wintertime. I saw this in Galina's own home.

"Q. Around the mill, did you see her favor her leg at all? A. Yes, she did.

“Q. When was that and where?

“A. In the rest room. We have one-half hour for our dinner period. Instead of an hour we have one-half hour and, naturally, when that whistle blows you are allowed to go to the clocks and punch out. I never ate very much in the ladies’ rest room. We have a bed and we have two chairs in (269) there, and there was enough girls to take them up. Galina happened to find a nail—happened to find one of these nail kegs and she brought it into the rest room, and she always tried to get her a chair, and then she would put her feet up on the nail keg, and she would sit in the chair and eat her lunch and put her leg up on the nail keg. She said, ‘We have to get some benches in here,’ and so she brought in some boards—I don’t know if she asked the millwright to make the benches or not but, eventually, we got benches in there.

“Q. She put her leg up on the keg? Was that before this accident? A. Yes, sir.

“Q. Of May 15th? A. Yes.”

There was other testimony to the effect that plaintiff, after the accident, stated that her knee had troubled her for a long period of time. A clear question was raised as to whether plaintiff’s knee trouble was an old condition which she had before the alleged accident, and appellant contends that it was entitled to an instruction that appellee would not be entitled to recover for any pre-existing disability she may have had; and also an instruction that appellee could not recover on account of any arthritis inasmuch as no claim was made for any such injury.

Appellant also contends that there was no competent medical testimony at the trial to show that appellee's disability was caused by the accident. The testimony of appellee's medical expert was not based on any history as to the height of the table from which appellee descended; nor the manner of the alleged jumping movement. In the absence of such history, his testimony was worthless to prove that the descent from the table was the cause of the injury, and the jury was allowed to speculate and conjecture, just as the doctor had done, as to whether the jump, or some other cause, was responsible for her condition.

SPECIFICATIONS OF ERROR 1, 2 AND 4

1. That there is no competent evidence to support a verdict in favor of plaintiff;

2. That as a matter of law, there was no violation of the Employers' Liability Act; that the matter complained of was not the proximate cause of plaintiff's alleged injury;

4. The trial court erred in refusing to hold as a matter of law that the activity in which plaintiff was engaged at the time of her alleged injury, in getting down from a sitting position from a 33 to 36 inch table, was not inherently dangerous.

SPECIFICATIONS OF ERROR NUMBER 1, 2, AND 4

Specifications of error 1, 2, and 4 raise questions which are substantially alike and to the end of brevity and convenience, we consolidate our argument thereon. Reference to page citations refer to Oregon Reports unless otherwise noted.

POINT ONE: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A RECOVERY UNDER THE EMPLOYERS' LIABILITY ACT OF OREGON.

POINT TWO: THERE IS NO EVIDENCE OF NEGLIGENCE WHICH WAS THE PROXIMATE CAUSE OF THE ALLEGED INJURY.

ARGUMENT

Viewing the evidence in a light most favorable to appellee except where her evidence is of an inference only and there is positive evidence of the fact to the contrary, it appears that appellee, an employee, was injured while descending from a table not more than 36 inches in height, in appellant's box factory, where power driven machinery is used. There is no contention in this case that appellee was injured through the use of machinery or electricity. Appellee relies entirely upon that part of

the Employers' Liability Act of Oregon, which is commonly known as the "and generally" clause, as follows:

"* * * and generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Appellee based her right to recover under the Employers' Liability Act on the contention that the general work in which defendant was engaged was inherently dangerous (T. 7). This contention was based on the erroneous belief that where the general occupation of an injured employee is one involving risk and danger, that an injury sustained while he is performing an act which is not inherently dangerous would be subject to the act. This was an impression held rather extensively by Bench and Bar as a result of a decision of the Supreme Court of the State of Oregon in the case of *Fitzgerald v. The Oregon-Washington R. and Nav. Co.*, 141 Or. 1, 16 P. (2D) 27, decided November 15, 1932. The Fitzgerald decision was an authority relied upon by this Court in the former appeal of this case. The Supreme Court of

Oregon has finally dispelled the impression in the recent case of *Barker v. Portland Traction Co.*, 43 Oregon Advance Sheets 49, rehearing denied, 44 Oregon Advance Sheets 377, on March 25, 1947. This decision makes clear that an injured employee in order to be within the Employers' Liability Act must be performing work which is inherently dangerous at the time he sustains his injury. It is not enough that his general work may involve risk and danger; but, on the contrary, although his general work involves risk and danger, if such an employee sustains an injury while performing an act which is not inherently dangerous, he is not entitled to the benefits of the Employers' Liability Act. Otherwise, as the Supreme Court of Oregon points out, there would be two different rules applied to the same type of accident to employees working for the same concern. Illustrating this point the Court states at P. 382:

"If the contention which we just quoted from the respondent's brief is correct and if, therefore, an employee, whose duties have 'the general characteristics' of inherent risk and danger, is entitled to the benefit of the act for an injury which befell him while he was doing something unaffected by inherent risk or danger, then it is possible for two employees who were injured simultaneously by a negligent act of their employer to receive treatment by the courts entirely dissimilar. Let us assume a hypothetical case in which two employes of an electrical concern are injured in the company's warehouse by the falling of ceiling plaster. If one were a lineman who generally worked

on the company's poles among power wires, the respondent's construction of the act would entitle him to the act's liberal provisions when he sued his employer for damages. Those provisions, which are several and important, include the one which exacts of employers subject to the act a very high degree of care. Other provisions which would be material in such an action deny to the employer the defenses of contributory negligence and of the fellow servant rule. In the event the employe died as a result of his injury, another provision of the act would enable his widow to maintain a damage action in her own name and still another would authorize her to sue for an unlimited amount of damages. Now let us look at the situation of the other employe in our hypothetical case, and let us assume that he was a bookkeeper who performed all of his duties in the warehouse. In an action by him to recover damages for the personal injury he incurred simultaneously with the other, and by the same tortious act, the respondent would not, we believe, contend that he would be entitled to the benefits of the Employers' Liability Act. This latter employe would, therefore, be relegated to reliance upon common law standards."

When we eliminate the general operation being carried on by appellant as a means of attempting to bring this case under the Employers' Liability Act, we have left only the simple act of descending from a reasonably low table to the floor—an act which thousands of persons find themselves doing year in and year out. *The person himself who is descending from a table to the floor is in the best position to know the manner in which he should*

descend, and his own strength and capabilities in that respect. The Supreme Court of Oregon in *O'Neill v. Odd Fellows Home*, 89 Or. 382, 174 Pac. 148, has held the Employers' Liability Act inapplicable where an employee was injured while descending from a stepladder of approximately the same height as the table here. The Court held as a matter of law that the Employers' Liability Act did not apply, pointing out in doing so that all work involves some risk and danger, but that is not sufficient, but rather the act being done must be "beset with danger." In the O'Neill case the plaintiff complained that the defendant had violated the Employers' Liability Act in that it:

"* * * negligently directed this plaintiff to use a small portable wooden stepladder; *that while plaintiff was descending said stepladder* in the discharge of her duties, her skirt caught upon the top thereof, and on account of the dangerous and defective condition of said stepladder as hereinafter set out, became fastened thereon, and caused said ladder on account of its dangerous and defective condition as hereinafter set out, to move or shift by reason of which plaintiff was caused to and did fall from said ladder to the cement floor with great force and violence, and by reason thereof sustained injuries."

It will be noted that the plaintiff was descending said stepladder when the accident occurred. It was further claimed that numerous improvements should have been

made and appliances furnished by the defendant in order to make the work safe. The Court states that (P. 389):

“It is a general rule of statutory construction that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned, unless the legislative intent clearly appears to the contrary: Black on Interpretation of Laws, P. 141; 2 Lewis’ Sutherland Statutory Construction, § 360. In a certain sense, there is a risk or danger in a person going up or down an ordinary flight of stairs in a home, but this is not the kind of risk or danger embraced within the meaning of the statute. It would hardly be said that a person’s work which required him to go up and down ordinary stairs, or hang clothing on a line using a common stepladder two or three feet in height not inherently defective, and with no particular danger involved therein, would be likely to harm or would be perilous, hazardous, or unsafe. The whole language of the act denotes that the kind of employment thereby protected is that which is beset with danger, the hazardous, dangerous employments similar to those enumerated in the act, or which under the circumstances or manner in which it is being executed is rendered dangerous, within the meaning of the act: See *Olds v. Olds*, 88 Or. 209 (171 Pac. 1046, 1048). We therefore hold that the case, as delineated by the complaint and the admitted portions of the answer, does not come within the employers’ liability law.”

And again in *Isaacson v. Beaver Logging Co.*, 73 Or. 28, 143 Pac. 938, the Oregon court held that:

“The employment of a servant in removing an iron spool, weighing 250 to 300 pounds, from a truck upon a railroad track not to be within the application of the act.”

Voluntary Bodily MOVEMENT Not Covered by Act

The Employers' Liability Act of Oregon was never intended to cover a mere bodily movement, especially when the manner of the movement is controlled by the employee. That was the precise situation in the O'Neill case, it is the precise situation in this case. For other cases holding the Act inapplicable as a matter of law, see *Hoffman v. Broadway Hazelwood*, 139 Or. 519, 10 Pac. (2d) 349, 11 Pac. (2d) 814; *Ferretti v. Southern Pacific Co.*, 154 Or. 97, 57 Pac. (2d) 1280; and *Ridley v. Portland Taxicab Co.*, 90 Or. 529, 177 Pac. 429.

In *McGivern v. Northern Pacific Railway Company*, 132 F. (2d) 213, the basis of the court's decision in holding there was no substantial evidence tending to prove negligence on the part of defendant, in connection with its duty to furnish its employees with a reasonably safe place in which to work, or in connection with the employer's duty to furnish the employees with "appropriate tools and appliances" (citing from an Iowa case) was stated at P. 218:

“he was hurt because his bodily movements did not take into consideration what he knew to be a necessary incident of his work.”

Appellee here knew all the conditions surrounding her employment, she had worked at numerous tasks and there was no compulsion that she work at this particular one (T. 200-201):

“Q. (By Mr. Powers): Is it not a fact that, while you were working there, you changed jobs very frequently and, at your request, were put on several different jobs?

“A. It was customary for the girls to change jobs there, because they were supposed to be able to take the places of the men that left to go to war and they were required to change jobs.

“Q. I will ask you: Did you not, on numerous occasions, ask for this job or that job, and that any switching around was at your own request?

“A. I don’t remember ever asking, but I was put on several different jobs there.

“Q. I will ask you if it is not a fact that you knew the nature of the work on this cutoff saw and had known it for many months prior to the time you started working on the cutoff?

“A. The reason they put me on the high cutoff—

“Q. I am asking you whether you knew what work there was to be done there, and how you would get in and out? A. Yes. (205)

“Q. You knew about that? A. Yes.”

There was positive testimony she requested the particular work (T. 242).

The courts in denying liability where an accident occurs through a purely voluntary bodily movement, base their decision upon the fact that an employee himself knows best his own strength and physical capabilities, and in denying recovery where an accident occurs through some voluntary bodily movement on the part of the injured employees, the courts merely recognize the fact that an individual himself is in the best position in making a simple bodily movement to exercise care for his own safety. This doctrine is somewhat akin to the simple tool doctrine, that is where an employee is injured while using some simple tool such as a stepladder or other appliance which is in common everyday use. In denying recovery to an employee injured in descending from a stepladder, or falling therefrom, or through a stepladder slipping, the Courts deny recovery for the reason that the injured person himself should know how to use the tool or appliance safely, the same as he should know how safely to make a simple bodily movement. See Annotation 145 ALR 542. The same doctrine is recognized by the Supreme Court of Oregon in the case of *Freeman v. Wentworth & Irwin, Inc.*, 139 Or. 1, 7 Pac. (2d) 796. The Oregon court further points out in that case that

an employer has no duty to furnish the most improved tools or latest methods (P. 11):

“As we have said before, the duty to use due care for its employees’ safety did not require the defendant to supply the latest and most improved tools, but only such as were reasonably safe and of a kind generally used for that purpose.”

Also see *Abbott v. Portland Trust & Savings Bank*, 160 Or. 699, 86 Pac. (2d) 962, (P. 701):

“‘As we view the matter, the careless and negligent manner in which plaintiff placed her hand in contact with the rollers while in operation was the proximate cause of her injuries.’”

The Oregon Court cites with approval *McGivern v. Northern Pacific Railway Co.*, *supra*. In *Waller v. Northern Pacific Terminal Co.*, 42 Oregon Advance Sheets 215, the Oregon court set aside a verdict on ground of insufficient evidence. The action was brought under the Federal Employers’ Liability Act, plaintiff claiming, among other things, that the defendant railroad company had failed to furnish a “reasonably safe place to work.” The accident actually occurred through a *bodily movement* of the plaintiff (P. 220):

“Plaintiff took hold of the grab iron on the side and at the rear end of the box car with his right hand,

turning to get hold of the grab iron. He then started to put his right foot on the stirrup, which is a piece of strap iron that comes down about eighteen inches below the sill of the car. As he attempted to put his right foot in the stirrup, his left foot slipped and he fell under or between the cars with the result that the car behind the one which he had attempted to board ran over his arm causing the injuries in question."

Plaintiff there testified that as a result of defendant's negligence he stepped on a stick which rolled under his foot and caused him to fall. However, upon cross-examination it developed that the plaintiff thought it was a stick he stepped on; the inference was that it was a stick, but the court held that was insufficient, stating (P. 235) :

"A we have said, in determining whether there was substantial evidence of negligence proximately causing plaintiff's injury, it is our duty to consider the testimony in the light most favorable to the plaintiff; but it is also our duty to give consideration to evidence adverse to the plaintiff's contention where it is wholly undisputed and uncontradicted and relates to matter of fact as distinguished from mere inferences. Where a plaintiff's case is based upon an inference or inferences only, that case must fail upon proof of undisputed facts inconsistent with such inferences. *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 77 L. Ed. 819, 53 S. Ct. 391."

And the court continues, (P. 238) :

"The defendant is not the insurer of the safety of its employees and is not under any obligation to

keep the premises absolutely safe. *Patton v. Texas and Pacific Railway Co.*; *McPherson v. Oregon Trunk Ry.*; *supra*.

“Failure to guard against a bare possibility of accident is not actionable negligence. *Brady v. Southern Ry. Co.*, *supra*. The plaintiff must present more than a mere scintilla of evidence of negligence. Substantial evidence is required. *McGivern v. Northern Pac. Ry. Co.*, *supra*; *Poe v. Illinois Central Railroad Co.*, 335 Mo. 507, 73 S. W. (2d) 779.

“‘It cannot be said that the situation did not present dangers but danger in a particular phase of an employment does not necessarily imply negligence. * * * Temporary conditions created by employees using or failing to use appliances furnished by the employer are not defects for which the employer may be held responsible in damages.’

McGivern v. Northern Pac. Ry. Co., *supra*.”

The appellee’s testimony here, the same as in the Waller case, leaves the manner as to the happening of the accident uncertain and vague. It is true there is an inference which might be drawn from appellee’s testimony, but such inference alone is insufficient, especially so where there is competent substantial testimony as to the manner in which the accident actually happened. While appellee’s testimony was vague and uncertain, the testimony of witnesses Leacock and Jeffries was definite and certain. This being the situation the inference created by the plaintiff’s testimony is dispelled and the situation

here when tested in the light of the Waller decision requires that consideration be given to the evidence of appellant showing the fact to be that appellee slid from the table to the floor from a sitting position; an act which hardly anyone could contend was "beset with danger."

It was held in *Winslow v. Missouri, K. & T. Ry. Co.*, 192 S. W. 121 (P. 123 Syllabus 17):

"If a railroad brakeman's jumping out of a freight car with a weak ankle alone caused his injury, and it was not produced in any way by a hole negligently left in the right of way by the road, the brakeman could not recover anything under the federal Employers' Liability Act."

Again it was held in *Bottig v. Polsky*, 101 Ore. 530, 201 Pac. 188, that the words "any work involving a risk or danger" as used in the Oregon statute, apply only to employments which are inherently dangerous.

It is our contention that the act which appellee was performing at the time of her alleged injury was not inherently dangerous and at most was merely a voluntary bodily movement on her part. The decision in the Barker case fully supports our contention.

In the Barker case, the plaintiff was a streetcar operator and the defendant was his employer. Just prior to his injury, plaintiff had stopped his car at a "switch."

Several inches of snow had fallen, and the automatic mechanism of the switch was clogged with snow and ice, and it did not function properly. The plaintiff descended from his car, took a broom and a steel rod with a chisel-like point, called a "switch rod"; swept away the loose snow, dug out the packed snow and ice from the switch, and while so doing slipped, through his own "bodily movement", fell and was injured. He claimed the Employers' Liability Act applied, because his general occupation involved "risk and danger." His complaint alleged various specifications of negligence, including *failure to provide a safe place to work*; failure to provide proper materials for the work he was doing; and failure to provide proper tools. The trial court refused to direct a verdict for defendant; the jury returned a verdict for the plaintiff. The Supreme Court reversed, holding that the motion for a directed verdict should have been granted; and in so holding expressly denied plaintiff's contention that if the general characteristics of an employment are hazardous, the "and generally clause" applies and makes the employer subject to the Act. The Court referred to the work being performed by the plaintiff in that case as follows:

"The removal of snow from the sidewalk in front of homes and stores by the occupants occurs every time snow falls. It is an operation of such a simple kind that householders and storekeepers entrusted

performance to their children and to itinerant laborers. Seemingly they do not think of it as being attended with any noticeable risk or danger. There is, of course, the possibility that one's foot may slip, as did the plaintiff's, but such may also happen to any one who ventures out of doors when snow is upon the ground. In fact, a servant who works indoors may slip on a waxed floor."

The reasoning of the Court in the Barker case fits into the facts here. Appellee's act of descending from a table not more than 36 inches in height, would *be neither more nor less dangerous when performed in a box factory, in a warehouse where no machinery was used, or in a private home.* The fact there was machinery in the building, and that in the course of her work she might be exposed to danger from that machinery, had nothing to do with her injury, and did not increase the hazard of the simple act which she was performing. In the Barker case, *supra*, the plaintiff was standing on a streetcar track, with trolley wires, carrying a heavy load of electricity, directly above him, and his streetcar, full of many kinds of machinery, directly adjoining him; but the Court looked, not to his surroundings, and not to the hazards of his usual employment, but to the simple nature of what he was doing at the time he was injured. The applicability of the Court's reasoning when applied

to the facts here is plain and we submit fully supports our contention.

In considering the impact of the Barker case upon cases like this one, however, it should be borne in mind that the decision in that case represents a complete reversal of the formerly accepted interpretation of the "and generally" clause; and that the Court went out of its way to make plain that it would not hereafter accept the general nature of an injured person's employment as a basis of imposing liability under the Act.

The Court points out, in its original opinion and in its opinion on rehearing, that if the applicability of the act depended on the general nature of the employment, there would be many instances in which two employees, injured from the same cause, would have entirely different rights of action; for instance, where one employee engaged generally in work involving "risk and danger," and the other not, and injured in the same manner (some act not inherently dangerous). In discussing this possibility, the Court said (Vol. 44 Advance Sheets, p. 383):

"Since courts never assume that legislation is intended to accomplish illogical results and divide people into favored and unfavored classes, the results which would follow from the respondent's construction of the act are worthy of mention. Hence, our delineation of the above situation."

Under the Oregon law defendant was entitled to a ruling by the lower Court that the Employers' Liability Act was inapplicable and a verdict directed accordingly in its favor.

SPECIFICATION OF ERROR NUMBER 3

The trial court erred in failing to instruct the jury properly as to the law in regard to the Employers' Liability Act with reference to the facts which the jury must find in order for said act to apply.

ARGUMENT

Assuming for the purpose of this argument that there was a question to be decided by the jury under the evidence as to whether plaintiff's act in descending from the table to the floor involved risk and danger, under the Oregon Employers' Liability Act, we submit the lower court erred in failing to instruct the jury properly as to the law respecting defendant's liability, if any, under the Employers' Liability Act. This being an action for negligence the jury should have been instructed as to what constitutes negligence and should have been

instructed on plaintiff's duty to prove by preponderance of the evidence that the defendant was guilty of negligence in the particular charged, and that such negligence, if any, was the proximate or contributing proximate cause of the accident. Further the Court erred in failing to instruct the jury in respect to the question of whether it was or was not "practicable" to operate with the appliances or improvements which plaintiff contended defendant failed to furnish without interfering with "the efficiency of the" operation. (T. 250) The Court's instruction virtually placed on defendant the obligation of an insurer, by failing to define for the jury the pertinent factual issues. Further, the Court deprived defendant of its theory of defense in instructing only as to appellant's contributory negligence. The defense and contention of the appellant was that the accident occurred through the sole negligence of plaintiff, and any failure to furnish other means of descending from the table to the floor would not be a proximate cause of the accident. *Under the Employers' Liability Act plaintiff could not recover in the event plaintiff's own negligence was the sole cause of the accident.* This is an instruction repeatedly given in the state courts and the appellant was entitled to have the instruction given here. The jury, under the instruction given by the Court on contributory negligence and without any instruction to the effect that appellee could not recover

if her negligence, if any, was the sole proximate cause of the accident, proceeded to consider the case in a confused light; the jury was left completely in the dark without any instruction from the Court as to the law in the event that they should find that appellee's sole negligence was the proximate cause of the accident. The jury under the Court's instruction was not advised that a complete defense to the action would be appellee's own negligence, if it were the sole proximate cause of the accident. The Court's failure to so instruct deprived appellant of its theory of defense and constituted prejudicial error. *Barnhart v. North Pacific Lumber Co.*, 82 Or. 657, 162 Pac. 843.

In *Winslow v. Missouri K. & T. R. Co.*, 192 S. W. 121 (Mo.), the court in considering a case where a brakeman was injured through jumping from a box-car to the ground, in reversing judgment in favor of the injured employee, held (Syllabus 11 and 12, P. 122):

"In such action an instruction that, if the jury found certain facts as to plaintiff's employment, his duty to inspect cars and close doors, and that, in the performance of the duty, he got into a car, and 'while alighting from said car door he stepped or jumped into a wash-out * * * which the defendant carelessly and negligently permitted to exist in its railroad yard * * * and which it carelessly and negligently permitted to be covered with weeds or brush,' and was injured, verdict should be for plaintiff, did not submit any question to the jury, being merely a description

of the hole, or an assertion that it was carelessly and negligently permitted to exist."

"In such action such instruction telling the jury that if, while alighting from the car door, plaintiff stepped or jumped 'into a washout, hole, or depression,' then, etc., was erroneous as failing to submit the question whether the right of way was in a reasonably safe condition, and such as would ordinarily be maintained at such a place by reasonably prudent railroad men."

A party is entitled to have his theory of defense submitted to the jury in clear and concise language. The rule is stated:

"* * * in 53 Am. Jur., Trial, pp. 431, 432:

" 'A charge to a jury should, if possible, be concise, plain, simple, and easily understood. It should be couched in clear, intelligible language, and such in its language and meaning as may be readily applied by the jury to the evidence. It is not sufficient that an instruction contains a correct statement of the law. An instruction should be so clear and concise as to be readily within the comprehension of men such as jurors who are not ordinarily educated in the law. If it is so worded that it might convey to the mind of an unprofessional man of ordinary capacity an incorrect view of the law applicable to the case, it is erroneous.' "

and again, at pp. 434, 435:

" 'They should be definite and certain, as applied to the facts of the case at bar, leaving nothing to

inference. They should be intelligible, free from obscurity, involvement, ambiguity, metaphysical intricacy, and doubt. The language of an instruction should be so plain that no doubt can arise as to its meaning, and that there is no chance of misunderstanding. A requested charge obnoxious to any of these objections should be refused even though, on dissection, it may be found to assert a correct legal proposition.'

"As further stated in 64 C. J., Trial, p. 668:

" 'An instruction may be misleading which * * * contains only a partial statement of the law, or bases the right of recovery on inconclusive facts.'

"See also *Peters v. Consolidated Freight Lines*, 157 Or., 605, 617 and *Reid's Branson, Instructions to Juries*, sec. 103."

The instructions were barren of any duty on the part of the plaintiff to exercise ordinary care for her own safety; and in this respect and the several other respects set forth above, the jury was unadvised as to the law to the prejudice of the defendant.

SPECIFICATION OF ERROR NUMBER 5

The trial court erred as a matter of law in failing to instruct the jury properly as to the measure of damages

ARGUMENT

It was appellant's contention that appellee's knee trouble was not the result of the accident, but was a pre-existing condition which she had had for some time. There was evidence on behalf of appellant that appellee stated after the alleged accident that her knee had troubled her for a long period of time (T. 233). Also a fellow worker testified that appellee had been having trouble with her knee prior to the alleged accident (T. 241-242). There was no contention made by appellee at the time of the accident that she had sustained any knee injury, but on the contrary, she stated after the accident that she had been having trouble with her knee for a long period of time, and accordingly appellee made application to appellant for benefits on account of her knee—the same condition she claims for here as a non-accidental condition; and she accordingly was paid benefits by appellant, therefor, in the sum of \$180 (T. 204). Also her hospital bills were paid on that basis.

In line with appellant's contention and the evidence produced, it was entitled to have the jury instructed as to its theory of defense and to the effect that if appellee's knee trouble was the result of a pre-existing disease or condition, that she could not recover in the present action. This was an important issue in the case,

and the jury had no instruction concerning this issue at all. In addition to the evidence mentioned above the medical evidence introduced on behalf of appellant very definitely shows that appellee's condition was not the result of accident. The trial court's failure to instruct on this important issue was prejudicial error. A party is entitled to an instruction on the essential issues as well as on the theory of his defense. Here the jury was left in the dark, and under the instructions given the jury could return a verdict in favor of the appellee, which it did regardless of the law respecting these important issues.

The situation is one to which the following rule well established in the state of Oregon is particularly applicable, as stated in *Merriam v. Hamilton*, 64 Or. 476, 481 (130 P. 406) :

“ ‘Where there are two or more possible causes of an injury for one or more of which the defendant is not responsible, the plaintiff, in order to recover, must show by evidence that the injury was wholly or partly the result of that cause which would render the defendant liable. If the evidence in the case leaves it just as probable that the injury was the result of one cause as much as the other, the plaintiff cannot recover. ’ ”

See also *Doumitt v. Diemer*, 144 Or. 36, 43; *Simpson v. Hillman*, 163 Or. 357, 364; *Horn v. National Hospital Assoc.*, 169 Or. 654, 668; and *Parker v. Pettit*, 171 Or. 481, 490, citing 45 C. J. 1167, and 38 Am. Jur. 1034.

This is a case in which it is apparent that there were two possible causes of plaintiff's present condition; admittedly the condition of her knee could have resulted from disease and appellee failed to sustain the burden of proof that her present condition was either solely or partially caused by the accident and appellant was entitled to an instruction limiting damages recoverable accordingly.

SPECIFICATION OF ERROR NUMBER 6

The trial court erred in refusing to instruct the jury, as requested by appellant, that appellee could not recover for any injury or disability caused by traumatic arthritis, no claim having been made for traumatic arthritis.

ARGUMENT

Dr. Chuinard, appellee's medical expert, testified at the trial (T. 90-91) :

“Q. Ordinarily, if you have a traumatic arthritis, it continues to develop, does it not?

“A. Well, not always, in a young person; if it is fairly superficial, that is, the cartilage has not been completely broken off so that the bone is entirely uncovered, then you usually do not get a continual—

“Q. Arthritis is shown by the roughening of the bones, is that what it is?

"A. That is right.

"Q. You have examined the X-rays taken on June 7th, I think it is marked, within three weeks after the accident. Will you state to the jury that, in your opinion, that roughening came as a result of an accident that occurred only two or three weeks before?

"A. Yes, it could.

"Q. In your opinion, Doctor, did that come as a result of anything that occurred just a short time, two or three weeks before?

"A. It *could* have, yes.

"Q. And your opinion is that it did, from the history given to you by the plaintiff?

"A. Yes, and ruling out any other cause of it. I mean, I have to rely on the previous history. It fits into the history she gave, yes.

"Q. What history did she give you about jumping, Doctor? You said no twisting, no sprain, that she knew of; she did not strike her knee against anything. What history was it that would indicate traumatic arthritis to you?

"A. The arthritis itself—I think I perhaps see what you are getting at. The arthritis itself is not something that happened immediately. Arthritis is a chronic roughening of the joints. It is something that remains after the whole thing is over. You see in the X-ray the smooth contour of the surface of the bone. That still remains. That is why I say now that the patient has *chronic traumatic* arthritis of her knee joint." (Emphasis supplied)

In her complaint (T. 6) the appellee claimed only that she sustained "a torn and severed semi-lunar carti-

lage in her right knee and torn and wrenched ligaments that repeatedly become torn and wrenched whenever she tried to walk." She made no claim, at any time prior to the trial, of traumatic arthritis or any similar condition. In his instructions to the jury, the trial judge made no mention of traumatic arthritis, and refused to give appellant's requested instruction 14, which would have instructed the jury not to consider any evidence of traumatic arthritis which appellee might have.

The Supreme Court of Oregon has held that where plaintiff's complaint specifies certain injuries alleged to have been suffered, evidence may not be received of other injuries not necessarily resulting from those specified. *Maynard v. Oregon R. R. Co.*, 43 Ore. 63. The same rule is set forth in 15 Am. Jur., Damages, Sec. 311, as follows:

"As a general rule, if the plaintiff in his pleading specifies injuries received, his recovery will be limited to such injuries as he alleges and such as necessarily and immediately flow therefrom; under such specific allegations he will not be permitted, against objection, to prove and recover for injuries which are not reasonably to be inferred as following from those alleged."

Dr. Chuinard, appellee's medical expert, testified (T. 87) that appellee's traumatic arthritis was a roughening of the articular cartilage. This is certainly an entirely

different thing from the torn and severed semi-lunar cartilage and the torn and wrenched ligaments appellee complained of in her complaint. It is an entirely separate condition, of which appellant had never before been advised, and for which the appellee had never before made any claim. Nevertheless, Dr. Chuinard testified (T. 87) :

“I do not believe this knee will ever be as good as it was before it was injured. That statement is based upon the fact that the patient has a roughening of the articular cartilage. * * * Another term used is traumatic arthritis, on the basis of trauma or injury.”

This was, in fact, the only claim made on appellee's behalf that her knee would never be as good as it was before. It was evidence of a kind peculiarly calculated to create sympathy for the appellee in the minds of the jury, and undoubtedly influenced their verdict, to the great disadvantage of appellant.

SPECIFICATIONS OF ERROR NUMBERED 7 AND 8

7. That there is no competent medical evidence sufficient to support the jury's verdict in favor of plaintiff, in that the only medical testimony as to the cause of the

injury is based upon hypothetical situations, not connected with the facts shown by the evidence; it appears from the testimony of plaintiff's medical expert that he had no history, knowledge or information as to manner, distance or height plaintiff jumped, or whether she jumped from a sitting position:

8. There is no competent medical evidence in this case sufficient to support the jury's verdict, in that plaintiff's medical testimony showed only possibility rather than probability of injury. The jury was required to speculate and conjecture as to which of two or more causes was responsible for plaintiff's alleged injury.

ARGUMENT

We respectfully submit that these two specifications are so closely related in substance that they can most conveniently be argued together.

Dr. Chuinard, appellee's medical expert, when asked to give the history of the patient on which he based his opinion as to the cause of the injury, stated (T. 86):

“She told me she injured her right knee on the 15th of May, 1943, when she jumped in the act of working; that she landed on her feet and at that time most of the weight seemed to be on her right leg, and she experienced sudden pain, severe pain in her right knee. When I questioned her as to this, she said, as

far as she could remember, there was no direct contact of the knee with the ground or the floor or any object and that she does not remember a severe twisting or sprain of the knee."

Later, he testified further (T. 94-95) :

"Q. How much of a jump did the plaintiff tell you she had made?

"A. Well, I cannot answer that question now. I don't remember that she—she described this thing to me at the time, but I can't tell you how many feet she jumped.

"Q. In the absence of knowing how far she jumped, is it not difficult for you to tell the jury that she landed with sufficient force that she would drive one bone against the other and break off a piece of bone?

"A. Well, I presume that I did know at the time, but if I were to say definitely just how far a person jumped now, I cannot say because——"

When the appellee was asked concerning her method of jumping, the following dialogue occurred (T. 201-202) :

"Q. Will you state to the jury whether, in getting down off the table, you assisted yourself with your hands, or if you sat down so you could slide off, the way you usually slide off the table, or whether you jumped off the table?

"A. I really don't remember just how I did go about jumping in there.

“Q. You don’t know whether you assisted yourself into the pit or not?

“A. I couldn’t say. I really don’t remember the way I did jump.”

The opinion of an expert witness must be based on facts. Those facts must be obtained either from his personal observation, or from a set of facts submitted to him, usually in the form of a hypothetical question. In the latter event, the facts submitted must be based upon some evidence in the case.

Lippold v. Kidd, 126 Or. 160, 269 P. 210;

Heider v. Barendrick, 149 Ore. 220, '39 P. (2) 957;

Cobb v. S. P. & S. Ry. Co., 150 Ore. 226, 44 P. (2d) 731.

The fatal weakness of Dr. Chuinard’s testimony is apparent. Obviously he was not present when the appellee was injured. The only evidence in the case as to the method of descent used by appellee, was her own testimony. She was always careful to say that she “jumped,” even while admitting that she did not know whether she sat down so she could slide off the table. However, taking into consideration the height of the table, the wide variety of possible methods of “jumping” which might be embraced within appellee’s nebulous recollection, and

the equally wide range of possible severity of impact caused by the various methods, it is plain that Dr. Chuinard did not have sufficient facts in his possession on which to base an opinion that appellee's jump was the probable cause of her injury; and any opinion that he did offer on that subject was necessarily worthless.

It is not sufficient for the appellee to show that her alleged jump was the possible cause of her injury. It was necessary for her to show, in order to prevail, that the jump was the probable cause.

Lippold v. Kidd, supra.

Other possible causes of the condition of appellee's knee were shown by the evidence. Dr. McClure, appellant's medical expert, testified (T. 148-149) that it could be caused by a condition known as osteochondritis dissecans. Mrs. Jeffries testified (T. 242-243) that appellee had had trouble with her knee, causing it to swell, before the date of the accident alleged in her complaint. We do not believe that the vague and uncertain testimony in this case provides any foundation on which a jury could properly find that the probable cause of plaintiff's injury was the jump of which she complains.

In conclusion, it is submitted that the trial court erred with respect to each specification of error presented herein, and that this case should be reversed.

Respectfully submitted,

VEAZIE, POWERS & VEAZIE.



In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

SHEVLIN-HIXON COMPANY, a
corporation,

Appellant,

vs:

GALINA M. SMITH,

Appellee.

ANSWER BRIEF OF APPELLEE

Appeal from the District Court of the United States for
the District of Oregon.

HON. CLAUDE McCULLOCH, *Judge.*

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PAUL P. CORTEN,

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In the United States
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SHEVLIN-HIXON COMPANY, a
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GALINA M. SMITH,

Appellee.

ANSWER BRIEF OF APPELLEE

Appeal from the District Court of the United States for
the District of Oregon.

HON. CLAUDE McCULLOCH, *Judge.*

STATEMENT OF THE CASE

This is the second time this case has been before this
court on appeal.

The plaintiff-appellee Galina M. Smith, appealed the
first time from an order of the trial judge directing a
verdict against her, and this court reversed the lower
court and sent this case back for a new trial. (See
Smith v. Shevlin-Hixon Company, a corporation, 157
F. (2d) 51.)

Upon the second trial, the evidence was substantially the same as in the first trial, and the jury awarded Mrs. Smith, the plaintiff, a verdict of \$5,900.00 damages against the defendant-appellant for injuries to her right knee that she received while she was employed by appellant in its box factory, one of its re-manufacturing divisions of its sawmill located at Bend, Oregon, and while engaged in work involving risk and danger to herself under and by virtue of the Employers' Liability Law of the State of Oregon. Thereupon the defendant-appellant appealed from the judgment entered upon such verdict of the jury. When we refer to the Transcript of Record, we will use the letter T.

Galina Smith was employed as an off-bearer or grader of material coming from the hi-cut-off saws in appellant's box factory at Bend, Ore., and worked at a 3-sided bench or table about waist high. The material so graded was removed by live rolls placed tightly against the said work benches and in such a manner as to make a fourth side or a complete enclosure of the working position of Mrs. Smith. The area within which the said Galina Smith worked was approximately 3 feet square, and proof showed the hi-cut-off saw from which all material came was about head high from the floor, or, stated in another way, a little more than 2 feet above the work bench itself, so that the injured person was working within slightly more than arm's length of the fast-moving power-driven saw from which the box shook was constantly dropping, and which Mrs. Smith was required to quickly grade and stack and place upon the power-driven rolls which made up the fourth side

of the pit. At the time of the accident the appellee was working at night and was required to move quickly from one position, as above described, to others of the long series of pits below similar types of hi-cut-off saws, for the reason that the night shift employed a lesser number of workmen so that during the night hours no new lumber was brought to the various hi-cut-off saws, and that as the material at one cut-off saw was worked up the sawyer would move to another saw and Mrs. Smith was required to climb out of the pit and go to the new working position.

The change of working position was accomplished by a number of methods. The proof here showed that Mrs. Smith used the less dangerous of all methods and the one which she was directed to use by her particular foreman. This was accomplished by climbing up on the waist-high, 3-sided work bench, which was covered by a steel plate, then to step over a part of the hi-cut-off saw upon a walkway, or cat-walk, suspended from the ceiling of the box factory, and which walkway was slightly higher than the hi-cut-off saws themselves, and to move upon this catwalk to where her sawyer had gone, and then reverse the process, stepping down a short stairway from the catwalk to the area of the hi-cut-off saw upon the steel-covered work bench or table top and then jump into the pit, a distance of a little less than 3 feet, and to be in position to resume her work as the sawyer began his work of cutting up the lumber at that particular saw, which change she had to make quickly in order to be in position when the sawyer started sawing on the new operation.

Evidence was conclusive that it was wholly unnecessary for the power-driven rolls to be waist-high and in such a position as to entirely enclose the working position of the off-bearer, as immediately after the filing of this damage action the defendant company reconstructed its box factory (T. 77, 113, 114 and 115) so that the rolls are under the 3-sided table or work bench and all the employees engaged in work of the type being done by Galina Smith go to and from their work positions without the use of any catwalk, without the requirement of climbing over any hi-cut-off saws, without the necessity for jumping from any table (T. 6) whatsoever, but remaining at all times on the floor level of the box factory itself and then walk into their working positions; and it was admitted by the appellant during the trial that the said change had in no wise impaired the efficiency of the operation itself, in fact it was claimed by the company that the change was made to speed up the work and not as a safety measure (T. 134, 168).

There was ample testimony to show appellee was an inexperienced employee on this particular operation and that she had only been working on the saw approximately two weeks before she was injured (T. 185). The testimony also showed that she was instructed by the foreman of the company to jump into this pit as a means of carrying out her employment, even after she complained about jumping, and that she was an inexperienced worker with reference to such particular employment (T. 187). She was injured on May 15, 1943, while so jumping into such pit and into her working

position (T. 189, 190, 193, 198, 26, 27, 28, 29, 33, 44).

The hi-cut-off saw was located approximately two feet above the table where appellee worked, on the end opposite the moving rolls. Here the sawyer took lumber from a bin behind him and sawed it into short lengths, which he slid down to the table where appellee was working. The appellee then sorted the cut lumber and after stacking it, placed it on the moving rolls, which carried it away. She was always required to work near power-driven, fast-moving saws, and upon every occasion when she entered her working position or left her working position she had to step over a part of the said hi-cut-off saw. So we specifically call the Court's attention to the fact that, in addition to the foregoing, it must be borne in mind that the plaintiff-appellee was required to work in its box factory, part of the sawmill itself, and that the entire operation comes within the definition contained in Section 102-1725, O.C.L.A. 1940, and thus is a hazardous occupation.

On May 15, 1943, appellee, at the direction of Guy Smith, foreman, was taken to the Lumberman's Hospital at Bend, Oregon, with an injured knee. Most of the foregoing facts were stipulated in the pre-trial proceedings, see T. pp. 2, 3, 4 and 5.

The pre-trial order also provided that "this is an action brought under and by virtue of the Employers' Liability Act of the State of Oregon (Sec. 102-1601, O.C.L.A. 1940) which requires, *among other things*, 'all owners, contractors or sub-contractors or other persons having charge of, or responsible for, any work involving

risk or danger to employees or the public, to use every device, care and precaution which is practicable to use for the protection of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances and devices.' "

It is refreshing to note that in the former appeal the following was before the Court, for as this Court says in its opinion:

"The appellant contended that the only means of entrance into her place of employment was to come down a cat-walk, crawl over a rail to the table, and then jump from it to the floor or crawl over the rolls. The appellee maintained that she could have walked to her station on the floor level or entered either under or over the rolls, or could have descended safely without jumping.

"The appellant asserted that a ladder, stairway, or a redesigning of the operational set-up could have been used without impairing the efficiency of the structure, and that thus there would have been provided a safe means of entrance, without requiring her to jump down thirty-three to thirty-six inches. The appellee denied this, insisted that there was a safe means of entry which she could have used, but admitted that on or about April 17, 1944, the rolls were removed from the rear of the enclosure in which the appellant had been required to work, and a moving belt placed under the front table, leaving open the rear of the enclosure.

"The appellant alleged that on May 15, 1943, when she jumped from the table top to the floor to begin work behind the No. 4 cut-off saw, she suffered a fractured bone and semilunar cartilage and 'other damage thereto', of her right knee, to-

gether with torn and wrenched ligaments of the said knee. Appellee denied that the appellant jumped, and contended that she was not injured at all on May 15, 1943, and that if she did jump, it was her own negligence.

"The appellant asserted that because she was employed in a box factory 'or sawmill', was required to be near and about power-driven machinery, and for other reasons, the work that she performed was one involving risk and danger to the employees and to the public, and particularly to herself, within the meaning of the Employers' Liability Act of Oregon. The appellee denied that any risk or danger referred to in, or within the interpretation of that statute caused, or in any way contributed to, the alleged injuries."

All of the foregoing is exactly the same as the case at bar and the verdict of the jury shows that they believed the contention made by the appellant in the former appeal and did not believe the contention of the appellee in the former appeal of this case.

These issues are referred to in the pre-trial order and are set out on Pages 5, 6, 7 and 8 of the Transcript of Record herein.

As appellant company says on Page 5 of its opening brief:

"Plaintiff contended that as a result of her descent from the table to the floor that 'she suffered a fractured bone and semilunar cartilage and other damage thereto, the exact nature and extent of which is unknown to the plaintiff, of her right knee, together with torn and wrenched ligaments of said knee'."

The evidence substantiated appellee's contention and includes traumatic arthritis and the so-called knee mouse which appellant now contends in its brief are not involved in this case (T. 26, 27, 28, 29, 33, 42, 43, 44, 55, 56, 189, 190, 193, 84, 86, 89, 107 and 198).

The appellee now contends and maintains that this second appeal in this case, under the circumstances as shown by the record in this court, does delay the proceedings on and to collect the judgment of the lower court, and appear to have been sued out merely for delay, and therefore appellee is now entitled to damages of 10% of the judgment in addition to the interest, in addition to the regular judgment, by reason of this present appeal, under sub. 2 of Rule 26 of this Court.

ANSWERING APPELLANT'S SPECIFICATIONS OF ERROR 1, 2 and 4

as shown on Pages 11 to 28 of its opening brief herein.

Appellant states on Page 13 of its brief that "appellee based her right to recover under the Employers' Liability Act on the contention that the general work in which defendant was engaged was inherently dangerous. This contention was based on the erroneous belief that where the general occupation of an injured employee is one involving risk and danger, *that an injury sustained while he is performing an act which is not inherently dangerous would be subject to the Act.*"

Then counsel cites a case decided in November, 1932 by the Oregon Supreme Court as authority for

this proposition, and also claims this same case (*Fitzgerald v. The Oregon-Washington R. and Nav. Co.*, 141 Or. 1, 16 P. (2d) 27) was also relied upon by this court upon the first appeal in the case at bar.

Counsel then goes on to refer to and quote extensively from the case of *Barker v. Portland Traction Co.*, 43 Or. Ad. Sheets 49, as authority for the proposition that an injured employee in order to be within the Employers' Liability Act must be performing work which is inherently dangerous at the time he sustains his injury, and *that if such employee, even though his general work involves risk and danger, if such employee sustains an injury while performing an act which is not inherently dangerous, he is not entitled to the benefits of the Employers' Liability Act.*

Counsel then states on Page 18 of his brief, *that the act was never intended to cover a mere voluntary bodily movement by the employee, especially when the manner of the movement is controlled by the employee, and relies principally upon the case of O'Neill v. Odd Fellows Home*, 89 Or. 382, 174 Pac. 148, and also upon the case of *Ferretti v. Southern Pacific Co.*, 154 Or. 97, 57 P. (2d) 1280, and other cases easily distinguished on the facts.

The trouble with appellant's reasoning is that it is not applicable to the facts in the case at bar as shown by the evidence and the record.

In the *Barker* case the injured workman had abandoned his duties which involved risk and danger and voluntarily assumed other work which was not inher-

ently dangerous.

The court says, 43 Or. Ad. Sheets, Page 71:

"The plaintiff was injured while removing snow from a small area of the public street, and as we have indicated work of that kind is not inherently dangerous."

The court then goes on to say on Page 71 of its opinion:

"According to our interpretation of the act, its protection is available only to (1) employments which are attended with inherent risks and dangers, and (2) employments which are rendered hazardous through the use of machinery, scaffolding, dangerous substances, electrical devices or other equipment and substances which are expressly enumerated in the act. Any other construction of the act would not only import into it a provision which is not there, but would grant to a streetcar operator, who occasionally cleans a switch, the protective features of the act, and withhold them from the switchmen and greasers who daily work about the switches. . . . It follows from what we have said that the plaintiff's work of removing snow from the switch was not within the protection of the Employers' Liability Act."

Moreover, the *Barker* case quotes with approval the Fitzgerald case, at 44 Or. Ad. Sheets, Pages 68, 69 and 70, and says, at Pages 69 and 70, relative to the Fitzgerald case:

"The statute expressly mentions 'Any defect in the structure materials, works, plant or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care, the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or

control of the works, plant, machinery, or appliances; . . .’

“The word ‘works’, as used in the statute, means an entire plant—all the real estate, buildings and machinery used in the particular business . . .

“Therefore, the jury would have been warranted in finding *that the unlighted condition of the stairway resulted from the neglect of the superintendent, manager, foreman, or other person, in charge of the works.* . . .

“It will be seen that the decision was not concerned with the ‘and generally’ clause. *The attacked judgment was sustained on the ground that, through the defendant’s failure to comply with requirements of the lighting statute, the defendant’s ‘works’, in which the plaintiff was required to perform his duties were rendered unsafe, in violation of the Employers’ Liability Act.*” (Italics added)

In the case at bar, the jury can say, and no doubt found that plaintiff-appellee was injured as the result of the neglect of her foreman in ordering her to jump into the pit to the place where her work station was, and also due to the neglect of the company to take away the moving rolls sooner so that appellee could have reached her work station by walking into it on floor level. She had an unsafe place to work, and the duties of her work were also unsafe.

Taking this view of the situation, it will also be noted that in the case at bar appellant’s “works” in which the plaintiff was required to perform her duties was rendered unsafe. Thus it may be clearly seen that this action is not based solely upon the “and generally” clause to which appellant refers, as shown by Sec. 102-1605, O.C.L.A.

The statute referred to in the opinion in the *Fitzgerald* case is Section 102-1605, O.C.L.A., which the court quotes at length, which statute is another part of the Employers' Liability Act of Oregon, and which also applied to the case at bar.

It is very clear that under the facts in the case at bar, Mrs. Smith had an unsafe place to work, her duties were unsafe and she was engaged in work every day that was inherently dangerous because it involved risk and danger by reason of the fact that the power-driven machinery consisting of the moving rolls were on one side of her working pit or trap, and near her, and the hi-cut-off power saw was within arm's length, and she did not move into this pit or trap by a mere voluntary bodily movement, *but jumped down in, in response to orders and commands from her foreman, from a level that was waist high, and the jury determined that the getting in and out of the pit was in and of itself a hazardous act and a part of her work and duties* (T. 63, 72, 73, 75, 76, 77, 119, 121, 163, 166, 169, 186, 187, 189, 201, 202 and 251). The court specifically instructed the jury that they must decide whether that way of getting to her work involved inherent danger (T. 251).

The *O'Neill* case that counsel cites is not even remotely similar to the facts here and was an action brought by a laundress employee of an Old People's Home who was injured in falling off a stepladder while hanging out some washing on a clothesline on the porch. The court held such an employment was not inherently dangerous and did not come within the Employers' Liability Law. But in discussing the application of the act,

the *O'Neill* case cites the case of *Olds v. Olds*, 88 Or. 209, 171 Pac. 1046, which supports appellee's contention and is authority for the proposition that plaintiff-appellee in the case at bar was engaged in work involving risk and danger at the time she was injured when she jumped down into the pit or trap where she worked. The *Olds* case, at 88 Or. 215, refers to Gen. Laws Oregon 1913, Chapter 12, Section 13, which is now Section 102-1725, O.C.L.A. subdivision (a), and which provides that if an employer is engaged in any of the occupations defined by such act as hazardous, the workmen employed by him in such occupation are deemed to be employed in a hazardous occupation but not otherwise. The hazardous occupations to which this act is applicable includes:

“(a) When power-driven machinery is used, the operation of . . . factories, mills or workshops.”

The court then holds that such a definition relates to a “work involving a risk or danger to the employees” and is applicable to the Employers' Liability Act of Oregon.

Then the case of *Eckhardt v. Jones' Market*, 105 Or. 204, 209 Pac. 470, involved a case where defendant was operating a factory where power-driven machinery was used and manual labor was exercised by the employees, and the court at 105 Or. Page 210, quotes with approval a definition of factories as “undertaking in which the business of working at commodities is carried on with power-driven machinery, either in manufacture, repair or change, and shall include the premises, yard and

plant of the concern.” The court held that as a matter of law the defendant was under the Employers’ Liability Act and engaged in a hazardous occupation, “*and the fact that plaintiff was not actually engaged in the operation of power-driven machinery when the injury occurred will not of itself relieve defendant from liability, provided the other elements of recovery are present.*” (105 Or. Page 211) (Italics added).

Then in the case of *Hardenbrook v. State Industrial Accident Commission*, 148 Or. 661, at Page 664, 38 P. (2d) 696, the court affirms the aforesaid definition of a factory and holds that such a place using power-driven machinery is a hazardous occupation, and say that the vital question involved is, “Was the plaintiff at the time of his injury carrying on work for an employer engaged in a hazardous business as defined by statute?” Then the court went on to decide that when power-driven machinery was used and plaintiff’s injury arose out of and in the course of his employment, then he was injured while engaged in a hazardous occupation.

We might also suggest that this court in its opinion in this case on the first appeal distinguishes the Ferretti case cited by appellant, *and also said that the jury could have found that the proximate cause of the accident to appellee herein was appellant’s negligence in requiring appellee to work in a place to which the only ingress was by means of a thirty-three inch jump or because the foreman instructed her to jump.*

This court also noted that appellee at the time of the accident was an inexperienced employee, and hurried

to her work just as the other girls did and tried to do as they did as well as she could, *and she also did what her foreman told her about jumping down into the pit off the steel covered table.* The record here shows the same facts.

ANSWERING APPELLANT'S SPECIFICATION OF ERROR NUMBER 3

as shown on Pages 28 to 32 of its opening brief herein.

Appellant states on Page 28 of its brief that "the trial court erred in failing to instruct the jury properly as to the law in regard to the Employers' Liability Act with reference to the facts which the jury must find in order for said act to apply."

Appellant complains that the court did not instruct the jury as to what constitutes negligence nor the rule as to the preponderance of the evidence, and that such negligence was the proximate or contributing cause of the accident.

The trial court covered these points in his instructions to the jury as is shown by the Transcript of Record herein at Pages 250, 251, 252, 253, 254 and 255.

Moreover, appellant does not set out the part referred to, and in case appellant happened to request any specific instructions it now complains about, appellant did not take any exceptions to the failure to give such requested instructions, or set out any grounds of objection urged at the trial, and so the points involved are waived under Rule 20, subdivision "D" of the Rules of

this Court, which requires such procedure.

Then appellant attempts to bolster its position by claiming that appellee *could not recover under the act in the event her own negligence was the sole cause of the accident.*

Appellant made no objection to the instructions given on this point and does not set out the part referred to, and if a request for such an instruction was made, no exception was made to the failure to give such an instruction or the grounds of objection urged at the trial set out, in accordance with the aforesaid Rules of this Court.

Moreover, we call the attention of this Court to Section 102-1713, O.C.L.A., which provides, among other things,

“ . . . In any action brought against such an employer on account of an injury sustained by his workman, it shall be no defense for such employer to show . . . *that the negligence of the injured workman, other than his wilful act, committed for the purpose of sustaining the injury, contributed to the accident.*” (Italics added)

Then the same *Fitzgerald* case, *supra*, also holds squarely in appellee's favor on this proposition, for the Oregon Supreme Court says, at 141 Or., Pages 14, 15:

“Finally, it is urged that plaintiff's injury was caused solely by plaintiff's own negligence in failing to use the lantern provided for his use by the company, however, the jury would have been warranted in finding, and doubtless did find, that defendant was negligent in a way constituting the proximate cause of the accident; that plaintiff him-

self was also negligent and that the combined negligence of the plaintiff and defendant caused the injury. *This is only another way of saying that defendant was contributorily negligent. Under the Employers' Liability Act, in cases between employer and employee contributory negligence may be taken into account by the jury in fixing the amount of the damage, but it is not a defense.*" (Italics added)

In the case at bar appellant did not plead or ever contend at any time that appellee's negligence, *and her own wilful act*, committed for the purpose of sustaining the injury, contributed to the accident, as provided by Section 102-1713, O.C.L.A., supra.

Then the case of *Hollopeter v. Palm*, 134 Or. 546, 291 Pac. 380, 294 Pac. 1056, involving the Employers' Liability Act, is also square in point on this proposition, and the opinion, at Page 564, says:

"The court charged the jury that the negligence of the plaintiff, *unless wilful*, was no defense; that the negligence of a fellow-workman of plaintiff on the building was not a defense; neither was assumption of risk available as a defense for defendant. These instructions were in accordance with the statute." (Italics added)

The court will also notice that the trial judge in the case at bar did instruct the jury upon the question of contributory negligence (T. 251, 252, 254 and 255). Section 102-1606, O.C.L.A., provides that the contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage.

ANSWERING APPELLANT'S SPECIFICATION OF ERROR NUMBER 5

as shown on Pages 32 to 35 of its opening brief herein.

Appellant complains that the trial judge did not instruct the jury properly as to the measure of damages in this case, and contends that plaintiff's condition and injury was not the result of the accident but was from a pre-existing condition.

The pre-trial order states that "Plaintiff contends that on May 15, 1943, when she jumped from the table top to the floor to begin work, she suffered a fractured bone and semilunar cartilage *and other damage thereto, the exact nature and extent of which is unknown to the plaintiff, of her right knee*, together with torn and wrenched ligaments of said knee" (T. 6, 7).

Nothing is said in the pre-trial order that appellant contended that appellee had a pre-existing injury, as it now urges in this brief.

Appellant is apparently complaining because the jury did not believe one or two of its witnesses (however, if the Appellant Court saw and heard these witnesses the reason for the disbelief would have been apparent) who testified appellee had some serious knee trouble before she was injured on May 15, 1943, and says there was no contention appellee sustained any injury to her knee at the time of the accident, on page 33. of its brief.

The Transcript of Record discloses on Pages 26, 27, 28, 29, and 33 that the records of the hospital at Bend, Oregon, show that appellee injured her knee May 15, 1943, on the job from jumping into a pit at the box factory of appellant.

Moreover, Mr. Veazie, of counsel for appellant, during the testimony of Dr. Woerner (T. 42 and 43), stipulated, with reference to the testimony, records and exhibits involved:

“Is it agreed this statement regarding ‘injury to the knee’, ‘jumped into the pit’ and ‘injury on the job’, that those are statements by Mrs. Smith to the nurse or to the doctor? Will that be agreed to?”

“Mr. Sims: I think that is right, your Honor. Yes.”

Then Dr. Woerner testified appellee had a fracture of the semilunar cartilage and other knee trouble as the result of this jump into the pit (T. 44).

The X-rays also indicate injury to the right knee as Dr. Chuinard explains in his testimony (T. 81, 82, 83, and 84). Dr. Chuinard also testified this condition was one that was incident to accident or trauma (T. 85). Dr. Chuinard then goes on to testify that appellee told him she injured her right knee on May 15, 1943, when she jumped in the act of working, that she landed on her feet and at that time most of the weight seemed to be on her right leg, and she experienced sudden pain, severe pain in her right knee. The doctor further testified that “relying upon appellee’s statement that she had no other injury or accident and on the history of continuous trouble since that time, and putting the

physical findings and the history and X-ray findings all together, it seems apparent that the patient has had a chronic disability in this knee resulting from the injury which she mentions . . . and that a surgical operation was required to remedy the injuries and that the knee would never be normal even after the operation and that there will be some permanent disability, no matter what is done" (T. 86, 87 and 89). Dr. Hosch also testified that he didn't think the knee would ever become perfect (T. 56).

Appellee herself testified that she changed to the job she was hurt on in May, 1943, and her foreman told her to jump down into the pit when she asked him how to get to her work position, and that when she complained about the jumping bothering her by feeling a drawing or gnawing sensation in her leg and wanting a different job, her foreman laughed at her and said, "Oh, that is just old age creeping up on you" (T. 185, 186 and 187). Appellee further testified that she had to work *fast*, that she jumped down to the floor of the pit, that she weighed 165 pounds then, and when she hit the floor she then got an awful lot of pain in her right knee; and that it hurt so bad she cried and her cutter called the foreman, and she told the foreman she had hurt herself, and he left her to get someone to take her place, and that Mr. Hufstader took her to the hospital (T. 188, 189, 190 and 191).

Appellee further testified that prior to May, 1943, her knees were all right and she never had any trouble with the knee and never complained of the knee before

the accident and that ever since the accident the knee aches and bothers her every day (T. 185, 198, 203 and 204).

Then we have the testimony of several of appellee's fellow workers who knew her for years or a long time, who testified as to her *state of good health* before this accident and injury *and that she did not have any knee trouble before May 15, 1943*, and how her right knee bothered her, etc., and she was crippled after the time she was hurt on that date (T. 60, 62, 66, 71, 72, 135, 174, and 175).

Dr. Hosch also testified he examined appellee before she went to work for appellant and that there was no evidence or history at that time of any lameness or difficulty of her knees prior to her going to work for appellant (T. 58).

Under the foregoing state of the record the evidence conclusively shows that appellee's injuries that she complains of were the result of the jump into the pit on May 15, 1943. Furthermore, appellant does not set out any requested instruction verbatim with grounds of objection at trial as required by Rule 20, sub. "D", of the Rules of this Court relative to this so-called alleged error, so the point is waived anyhow.

ANSWERING APPELLANT'S SPECIFICATION OF ERROR NUMBER 6

as shown on Pages 35 to 38, of its opening brief herein.

Under this alleged error appellant contends that the trial court erred in refusing to instruct the jury, as requested by appellant, that appellee could not recover for any injury or disability caused by traumatic arthritis, no claim having been made for such an ailment.

Appellant is a bit forgetful as to appellee's contentions as to the nature and extent of her injuries. On Page 36 of its brief this statement appears: "In her complaint (T. 6) the appellee claimed only that she sustained a torn and severed semi-lunar cartilage in her right knee and torn and wrenched ligaments that repeatedly became torn and wrenched whenever she tried to walk." No such language appears in Page 6 or in any other page of the Transcript of Record herein.

Turning back to Page 5 of its brief, appellant says:

"Plaintiff contended that as a result of her descent from the table to the floor that she suffered a fractured bone and semilunar cartilage and other *damage thereto, the exact nature and extent of which is unknown to plaintiff, of her right knee,* together with torn and wrenched ligaments of said knee" (Tr. 6, 7). (Italics added)

The last paragraph was also taken from the pre-trial order, and does appear on Page 6 and 7 of the Transcript of Record herein.

We think that no further argument is needed on this proposition.

ANSWERING APPELLANT'S SPECIFICATIONS OF ERROR NUMBERED 7 and 8

as shown on pages 38 to 42, of its opening brief herein.

We believe that these so-called errors can be answered by the same facts and argument we used in answering Appellant's Specification of Error Number 5, and we refer the court to pages 18 to 21 this brief, and we also refer to the opinion of this court on the first appeal of this case.

CONCLUSION

In conclusion, we point out to the court that the law of this case was settled by this court in its opinion on the first appeal, as the evidence is substantially the same as before, and we have distinguished the Barker case, which is the only case recently decided by the Oregon Supreme Court that appellant absurdly contends controls this case. We respectfully urge the court that the verdict of the jury was just and correct, that appellant has had two fair trials, no prejudicial or reversible error appears in the record; and if there should be any error, it is harmless error, and that it appears that the within appeal delays the proceedings on and to collect the judgment of the lower court, and has been sued out merely for delay, and damages of 10% of the judgment herein in addition to the usual interest and regular judg-

ment should be awarded appellee herein, pursuant to subdivision 2 of Rule 26 of the Rules of this Court.

Respectfully submitted,

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